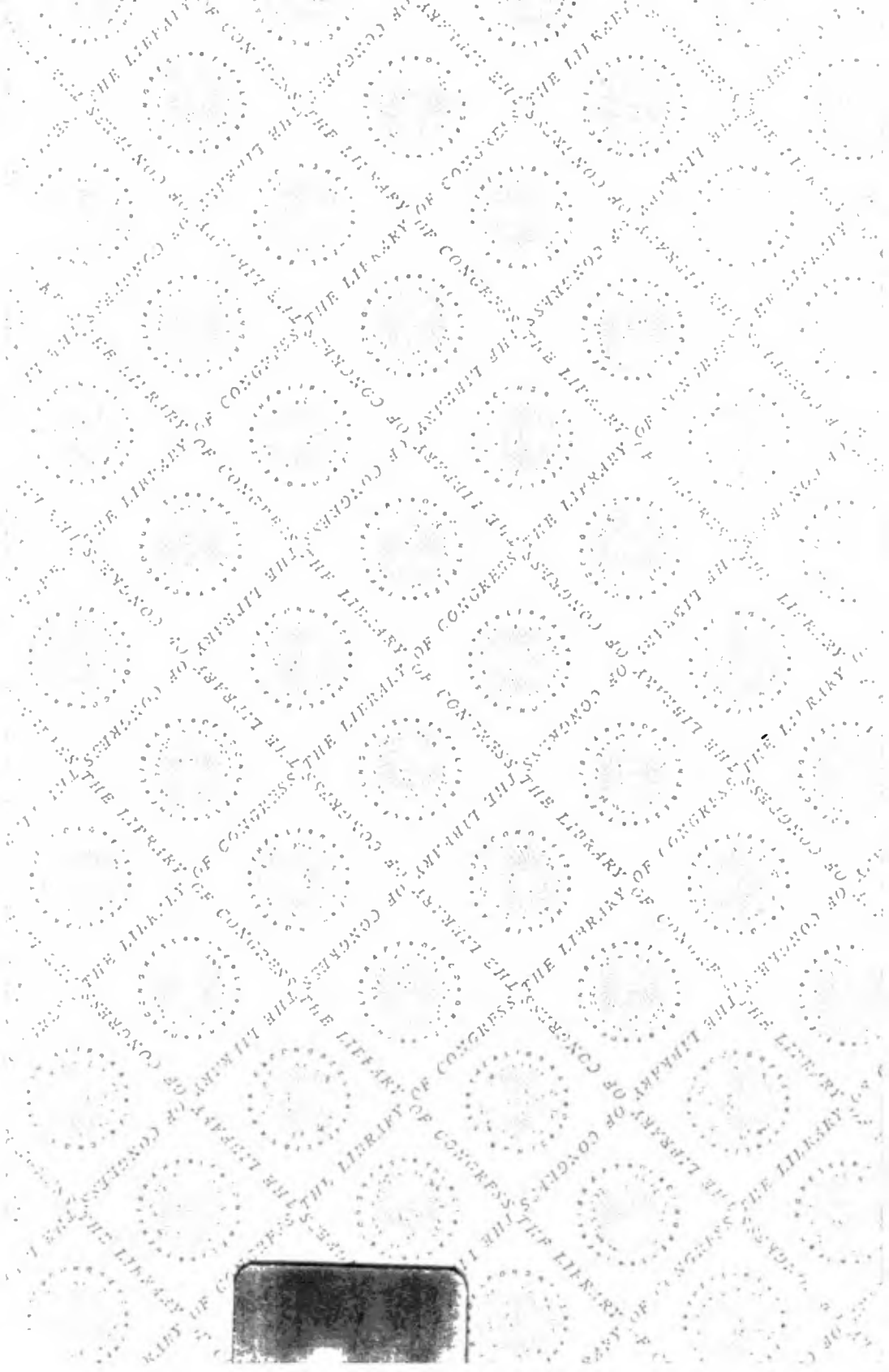
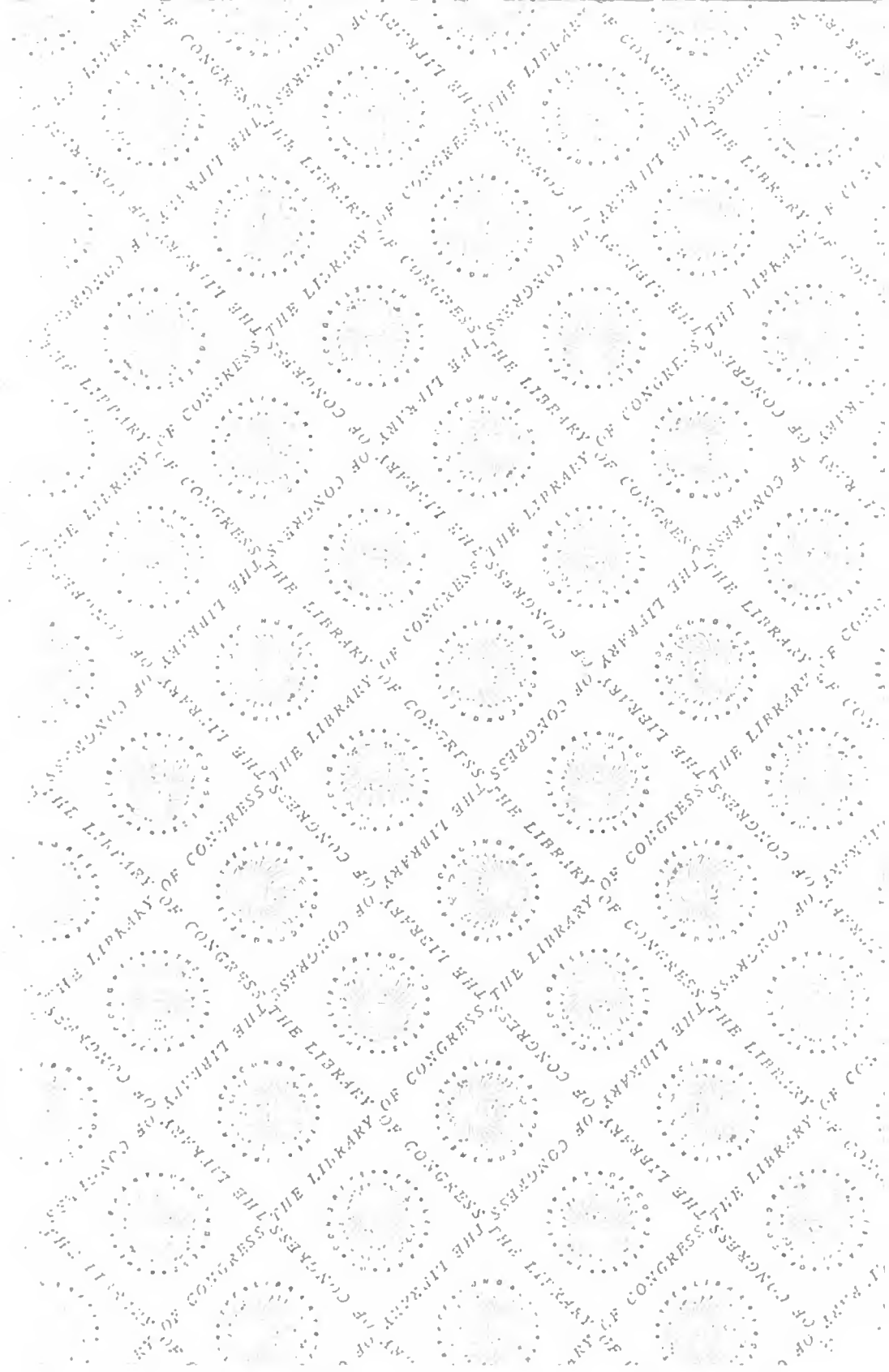


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# NATIONAL EMERGENCIES ACT

*United States Congress House Committee on the Judiciary.  
" Subcommittee on Administration Law and Governmental  
Relations.*

## HEARINGS

BEFORE THE

### SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

### COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

**H.R. 3884**

TO TERMINATE CERTAIN AUTHORITIES WITH RESPECT TO  
NATIONAL EMERGENCIES STILL IN EFFECT, AND TO PROVIDE  
FOR ORDERLY IMPLEMENTATION AND TERMINATION OF  
FUTURE NATIONAL EMERGENCIES

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MARCH 6, 13, 19, AND APRIL 9, 1975

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Serial No. 7



Printed for the use of the Committee on the Judiciary

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WASHINGTON : 1975

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# NATIONAL EMERGENCIES ACT

THURSDAY, MARCH 8, 1975

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ADMINISTRATIVE LAW  
AND GOVERNMENTAL RELATIONS,  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 2:15 p.m., in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Mazzoli, Pattison, Moorhead, and Fish.

Also present: William P. Shattuck, counsel; Alan F. Coffey, Jr., associate counsel.

Mr. FLOWERS. We will call the meeting of the Subcommittee on Administrative Law and Governmental Relations to order; and I have the great pleasure of presenting our first witness on this most important matter of termination of national emergencies, our most distinguished colleague and perhaps best known legislator in the entire world, our chairman and my great friend, Peter Rodino.

We will have later on today the distinguished Senator from Idaho, Mr. Church, and a former colleague of this committee, the distinguished Senator from Maryland, Mr. Mathias.

So, without further ado I would like to turn the floor over to our chairman. I know that he is the sponsor of the bill on the House side which I joined him in introducing. Mr. Chairman, we will be delighted to hear from you at this time.

## TESTIMONY OF HON. PETER W. RODINO, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. RODINO. Mr. Chairman, thank you very much for providing me with this opportunity to speak on behalf of H.R. 3884 on national emergencies.

Mr. Chairman, I first would like to state that I have a prepared statement, a detailed statement which details the various provisions of the bill, which I would like to have included in the record in its entirety.

Mr. FLOWERS. Without objection, it will certainly be included in full.

Mr. RODINO. Thank you, Mr. Chairman. [See p. 17.]

Mr. Chairman, I am accompanied by Mr. Earl Dudley, the general counsel of our committee, and I thought that this would be a fine moment for him to be able to initially make his appearance before your subcommittee.

Mr. FLOWERS. We appreciate you bringing him up here. Of course I have had the opportunity of meeting Mr. Dudley in your office several days ago, and we are delighted to have him aboard as general counsel, and look forward to a lot of good work out of him. I know we are going to see that in all the activities in the Judiciary Committee. If you have a word to say, it would be appropriate.

Mr. RODINO. Mr. Dudley?

Mr. DUDLEY. Thank you for welcoming me, Mr. Chairman. I too look forward to a long and profitable relationship; and I'm glad to be here.

Mr. FLOWERS. Thank you.

Mr. RODINO. Mr. Chairman, I am pleased that the Subcommittee on Administrative Law and Governmental Relations has initiated these hearings on national emergencies. It is important that governmental functioning and procedures in emergency situations be understood and subject to congressional oversight.

And there is a further pressing need for a statutory resolution and definition concerning the exercise of the powers and authorities in connection with national emergencies. A basic assumption in any such legislative consideration is that our Government should function in accordance with regular and normal provisions of law, rather than special exceptions and procedures which were intended to be in effect for limited periods to meet specific emergency conditions.

We are faced with the situation in which the national emergency declared in December of 1950 by President Truman in connection with the Korean conflict remains in effect; and that even earlier national emergency declared by President Roosevelt in March of 1933 to meet the pressing problems of the depression has not been terminated. Two other emergencies are still in effect. There was a national emergency proclaimed by President Nixon on March 23, 1970, because of a postal strike, and again on August 15, 1971, a national emergency was declared to deal with the balance of payments and other international problems.

The time has come for an end of conducting governmental activity under authority of laws which derive force from emergencies declared years in the past to meet problems and situations which have long since disappeared, or are now drastically changed. The history of continued and almost routine utilization of such emergency authorities for years after the original crisis has passed serves only to emphasize the fact that there is an urgent need to provide adequate laws to meet our present day needs.

In the last Congress I introduced H.R. 16668 on the subject of national emergencies, and on October 7, 1974, a similar bill, S. 3957, passed the Senate and was referred to this committee while it was not possible to complete consideration of those measures in the last Congress—we were occupied with another pressing problem—the committee did receive departmental reports late in the year which indicated general support for the bill as passed by the Senate. The reports contained additional material and background information which may be considered by the subcommittee in connection with the bill.

The bill before us, H.R. 3884, which I have introduced in this session, contains provisions which have been worked out in cooperation with the Senate and I understand that an identical bill will be intro-

duced in that body. H.R. 3884, with two changes, is identical to the bill passed by the Senate last fall. The bill embodies a technical change suggested by the Office of Management and Budget in its report on the earlier bill. The language concerning the termination of the powers and authorities relating to existing emergencies in section 101 of title 1 of the bill has been modified so that the bill would, as of 1 year from the date of enactment, terminate the powers and authorities under emergencies in effect on the date of enactment rather than the emergencies in effect 1 year from date of enactment as in the earlier version.

[A copy of H.R. 3884 follows:]

94TH CONGRESS  
1ST SESSION

# H. R. 3884

## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 27, 1975

Mr. ROBINO (for himself, Mr. FLOWERS, Mr. DANIELSON, Miss JORDAN, Mr. MAZZOLI, Mr. PATTISON of New York, and Mr. FISH) introduced the following bill; which was referred to the Committee on the Judiciary

## A BILL

To terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*  
3 That this Act may be cited as the "National Emergencies  
4 Act".

### 5 TITLE I—TERMINATING EXISTING DECLARED 6 EMERGENCIES

7 SEC. 101. (a) All powers and authorities possessed by  
8 the President, any other officer or employee of the Federal  
9 Government, or any executive agency, as defined in section  
10 105 of title 5, United States Code, as a result of the exist-

1   ence of any declaration of national emergency in effect on  
2   the date of enactment of this Act are terminated one year  
3   from the date of such enactment. Such termination shall not  
4   affect—

5           (1) any action taken or proceeding pending not  
6       finally concluded or determined on such date;

7           (2) any action or proceeding based on any act  
8       committed prior to such date; or

9           (3) any rights or duties that matured or penalties  
10   that were incurred prior to such date.

11       (b) For the purpose of this section, the words “any  
12   national emergency in effect” means a general declaration of  
13   emergency made by the President pursuant to a statute au-  
14   thorizing him to declare a national emergency.

## 15           TITLE II—DECLARATIONS OF FUTURE

### 16                   NATIONAL EMERGENCIES

17       SEC. 201. (a) In the event the President finds that a  
18   proclamation of a national emergency is essential to the  
19   preservation, protection and defense of the Constitution or  
20   to the common defense, safety, or well-being of the territory  
21   or people of the United States, the President is authorized  
22   to proclaim the existence of a national emergency. Such  
23   proclamation shall immediately be transmitted to the Con-  
24   gress and published in the Federal Register.

25       (b) Any provisions of law conferring powers and au-

1   thorities to be exercised during a national emergency shall  
2   be effective and remain in effect (1) only when the Presi-  
3   dent (in accordance with subsection (a) of this section),  
4   specifically declares a national emergency, and (2) only in  
5   accordance with this Act. No law enacted after the date of  
6   enactment of this Act shall supersede this title unless it does  
7   so in specific terms, referring to this title, and declaring that  
8   the new law supersedes the provisions of this title.

9       SEC. 202. (a) Any national emergency declared by the  
10   President in accordance with this title shall terminate if—

11           (1) Congress terminates the emergency by concur-  
12   rent resolution; or

13           (2) the President issues a proclamation terminating  
14   the emergency.

15   At the end of each year following the declaration of an  
16   emergency which is still in effect, the President shall publish  
17   in the Federal Register and transmit to the Congress a notice  
18   stating that the emergency is still in effect. Any national  
19   emergency declared by the President shall be terminated on  
20   the date specified in any concurrent resolution referred to in  
21   clause (1) of this subsection, and any powers or authorities  
22   exercised by reason of said emergency shall cease to be  
23   exercised after such specified date, except that such termina-  
24   tion shall not affect—



1           (A) any action taken or proceeding pending not  
2       finally concluded or determined on such date;

3           (B) any action or proceeding based on any act com-  
4       mitted prior to such date; or

5           (C) any rights or duties that matured or penalties  
6       that were incurred prior to such date.

7       (b) Not later than six months after a national emer-  
8       gency is declared, and not later than the end of each six-  
9       month period thereafter that such emergency continues, each  
10      House of Congress shall meet to consider a vote on a con-  
11      current resolution to determine whether that emergency shall  
12      be terminated.

13       (c) (1) A concurrent resolution to terminate a national  
14      emergency declared by the President shall be referred to  
15      the appropriate committee of the House of Representatives  
16      or the Senate, as the case may be. One such concurrent reso-  
17      lution shall be reported out by such committee together with  
18      its recommendations within fifteen calendar days, unless  
19      such House shall otherwise determine by the yeas and nays.

20       (2) Any concurrent resolution so reported shall become  
21      the pending business of the House in question (in the case  
22      of the Senate the time for debate shall be equally divided be-  
23      tween the proponents and the opponents) and shall be voted  
24      on within three calendar days thereafter, unless such House  
25      shall otherwise determine by yeas and nays.

1       (3) Such a concurrent resolution passed by one House  
2 shall be referred to the appropriate committee of the other  
3 House and shall be reported out by such committee together  
4 with its recommendations within fifteen calendar days and  
5 shall thereupon become the pending business of such House  
6 and shall be voted upon within three calendar days, unless  
7 such House shall otherwise determine by yeas and nays.

8       (4) In the case of any disagreement between the two  
9 Houses of Congress with respect to a concurrent resolution  
10 passed by both Houses, conferees shall be promptly ap-  
11 pointed and the committee of conference shall make and file  
12 a report with respect to such concurrent resolution within  
13 six calendar days after the legislation is referred to the com-  
14 mittee of conference. Notwithstanding any rule in either  
15 House concerning the printing of conference reports in the  
16 Record or concerning any delay in the consideration of such  
17 reports, such report shall be acted on by both Houses not  
18 later than six calendar days after the conference report is  
19 filed. In the event the conferees are unable to agree within  
20 forty-eight hours, they shall report back to their respective  
21 Houses in disagreement.

22       (5) Paragraphs (1)–(4) of this subsection, subsection  
23 (b) of this section, and section 602 (b) of this Act are en-  
24 acted by Congress—

1           (A) as an exercise of the rulemaking power of the  
2       Senate and the House of Representatives, respectively,  
3       and as such they are deemed a part of the rules of each  
4       House, respectively, but applicable only with respect to  
5       the procedure to be followed in the House in the case of  
6       resolutions described by this subsection; and they super-  
7       sede other rules only to the extent that they are incon-  
8       sistent therewith; and

9           (B) with full recognition of the constitutional right  
10       of either House to change the rules (so far as relating to  
11       the procedure of that House) at any time, in the same  
12       manner, and to the same extent as in the case of any  
13       other rule of that House.

14       **TITLE III—DECLARATIONS OF WAR BY**  
15                               **CONGRESS**

16       **SEC. 301.** Whenever Congress declares war, any provi-  
17       sions of law conferring powers and authorities to be exercised  
18       during time of war shall be effective from the date of such  
19       declaration.

20       **TITLE IV—EXERCISE OF EMERGENCY POWERS**  
21                               **AND AUTHORITIES**

22       **SEC. 401.** When the President declares a national emer-  
23       gency no powers or authorities made available by statute for  
24       use in the event of an emergency shall be exercised unless  
25       and until the President specifies the provisions of law under

1 which he proposes that he, or other officers will act. Such  
2 specification may be made either in the declaration of a  
3 national emergency, or by one or more contemporaneous or  
4 subsequent Executive orders published in the Federal  
5 Register and transmitted to the Congress.

6 TITLE V—ACCOUNTABILITY AND REPORTING  
7 REQUIREMENTS OF THE PRESIDENT

8 SEC. 501. (a) When the President declares a national  
9 emergency, or Congress declares war, the President shall  
10 be responsible for maintaining a file and index of all sig-  
11 nificant orders of the President, including Executive orders  
12 and proclamations, and each such Executive agency shall  
13 maintain a file and index of all rules and regulations, issued  
14 during such emergency or war issued pursuant to such  
15 declarations.

16 (b) All such significant orders of the President, in-  
17 cluding Executive orders, and such rules and regulations  
18 shall be transmitted to the Congress promptly under means  
19 to assure confidentiality where appropriate.

20 (c) When the President declares a national emergency  
21 or Congress declares war, the President shall transmit to  
22 Congress, within thirty days after the end of each three-  
23 month period after such declaration, a report on the total  
24 expenditures incurred by the United States Government  
25 during such three-month period which are directly attribu-

1 table to the exercise of powers and authorities conferred by  
2 such declaration. Not later than thirty days after the termi-  
3 nation of each such emergency or war, the President shall  
4 transmit a final report on all such expenditures.

5 TITLE VI—REPEAL AND CONTINUATION OF  
6 CERTAIN EMERGENCY POWER AND OTHER  
7 STATUTES

8 SEC. 601. (a) Section 349 (a) of the Immigration and  
9 Nationality Act (8 U.S.C. 1481 (a)) is amended—

10 (1) at the end of paragraph (9), by striking out

11 “; or” and inserting in lieu thereof a period; and

12 (2) by striking out paragraph (10).

13 (b) Section 2667 (b) of title 10 of the United States  
14 Code is amended—

15 (1) by inserting “and” at the end of paragraph

16 (3);

17 (2) by striking out paragraph (4); and

18 (3) by redesignating paragraph (5) as (4).

19 (c) The joint resolution entitled “Joint resolution to  
20 authorize the temporary continuation of regulation of con-  
21 sumer credit”, approved August 8, 1947 (12 U.S.C. 249),  
22 is repealed.

23 (d) Section 5 (m) of the Tennessee Valley Authority  
24 Act of 1933 (16 U.S.C. 831d (m)) is repealed.

1 (e) Section 1383 of title 18, United States Code, is  
2 repealed.

3 (f) Section 6 of the Act entitled "An Act to amend  
4 the Public Health Service Act in regard to certain matters  
5 of personnel and administration, and for other purposes",  
6 approved February 28, 1948, is amended by striking out  
7 subsections (b), (c), (d), (e), and (f) (42 U.S.C.  
8 211b).

9 (g) Section 9 of the Merchant Ship Sales Act of 1946  
10 (50 U.S.C. App. 1742) is repealed.

11 (h) This section shall not affect—

12 (1) any action taken or proceeding pending not  
13 finally concluded or determined at the time of repeal;

14 (2) any action or proceeding based on any act  
15 committed prior to repeal; or

16 (3) any rights or duties that matured or penalties  
17 that were incurred prior to repeal.

18 SEC. 602. (a) The provisions of this Act shall not apply  
19 to the following provisions of law, the powers and authori-  
20 ties conferred thereby, and actions taken, thereunder:

21 (1) Section 5 (b) of the Act of October 6, 1917, as  
22 amended (12 U.S.C. 95 (a) ; 50 U.S.C. App. 5 (b) ) ;

23 (2) Section 673 of title 10, United States Code;

24 (3) Act of April 28, 1942 (40 U.S.C. 278b) ;

25 (4) Act of June 30, 1949 (41 U.S.C. 252) ;

1           (5) Section 3477 of the Revised Statutes, as  
2       amended (31 U.S.C. 203) ;

3           (6) Section 3737 of the Revised Statutes, as  
4       amended (41 U.S.C. 15).

5       (b) Each committee of the House of Representatives  
6       and the Senate having jurisdiction with respect to any pro-  
7       vision of law referred to in subsection (a) (1)-(6) of this  
8       section shall make a complete study and investigation con-  
9       cerning that provision of law and make a report, including  
10      any recommendations and proposed revisions it may have,  
11      to its respective House of Congress within two hundred and  
12      seventy days after the date of enactment of this Act.

Mr. RODINO. The report the committee received from the Department of Defense recognized that world conditions and national conditions have changed since the state of national emergency was declared in 1950. That Department stated that it recognized the desirability of terminating existing states of emergency and further stated that it had no objection to their termination. The Department of Defense referred to the fact that some of the emergency authorities had over the years come to be relied upon in the day-to-day operations of the Department and that these continuing needs would have to be met. The subcommittee will have the opportunity of considering this aspect of the effect of the present bill in its future deliberations.

The report which was received from the Department of the Treasury on November 12, 1974, should be helpful to the subcommittee in its consideration of the potential impact of the bill upon the authority for the regulations applicable during periods of financial crisis to banks which are members of the Federal Reserve System and the limitations and restrictions on the activities of such banks during those periods. That report also states the position of that department concerning the authority providing for regulation during emergencies of banking transactions, gold and silver activities, transactions in foreign exchange, and the exercise of rights in property subject to American jurisdiction in which foreign nationals have an interest.

Some of these matters are of current significance, and therefore the situation merits careful evaluation and study. The Treasury Department has also referred to certain provisions of law concerning current practices in the warehousing of merchandise in bonded warehouses. The subcommittee may desire additional information on this subject.

I might say, Mr. Chairman, that the facts and the needs I have outlined demonstrate the need for legislative action. As is the case with most important matters, the resolution of the various questions involved in such basic and significant legislation is not a simple matter. However, I must say I am impressed with the cooperation and understanding we have experienced in working with the Senate—they have been working on this matter for some time—and in our contacts with the executive departments in connection with this subject, and I am pleased that there is general agreement that the time has come for positive and constructive legislative action on this bill.

And I do commend your committee, Mr. Chairman, for taking the initiative to begin these hearings on this matter which I think is long overdue for correction.

Mr. FLOWERS. Thank you, Mr. Chairman; and I would certainly concur in your statement about the amount of working cooperation that we have experienced already in connection with the Senate. In addition every indication is that the executive branch as well recognizes that the time has come for legislation on this subject.

I thank you, Mr. Chairman, for this statement, which will give us a good working position in connection with the legislation. I would ask Mr. Moorhead, the ranking minority member, if he has any questions of the chairman.

Mr. MOORHEAD. Mr. Chairman, you are to be commended for introducing this bill, which surely will go a long way toward solving some of the problems which we have in the country. I don't think people want administrative fiat, rather than laws, that come into effect and stay in effect as many years as these, just because there has been a



declaration of emergency. Obviously we need to change the basic law upon which those decrees were issued.

There was one thing, as I was reading it, that I have some questions about, though, and that was the procedure that is to be followed when the current resolution has passed one of the two Houses. As I see it, it is referred to a committee of the other House, and must be referred out of that committee to the floor within 15 calendar days; it doesn't give the committee any real opportunity to decide whether they want to refer it out, or don't want to refer it out; they are mandated to refer it out. I assume with a pass, or don't pass, recommendation it would have to go to the floor; is that correct?

Mr. RODINO. That's correct.

Now, I might interject that the time element, of course, is something that I think is a matter that obviously could be considered by the committee. I recognize that these are matters that require some kind of attention, and whether a given provision is, or is not, desirable, I think is a matter the subcommittee would have to consider.

As is pointed out in that portion of my statement which I didn't read—these provisions parallel those which have been set forth in section 7, Public Law 93-148, the War Powers Act, which we passed in 1973. I don't think we have to be bound by that, but we paralleled it on that basis.

Mr. MOORHEAD. I was wondering about the requirement that the House has to vote on the matter within 3 calendar days. I see a situation where something as important as this might be, that 15 days in the committee and 3 calendar days on the floor might not be adequate time for a House to make a determination, even though the other House has already acted.

I'm not taking a position on it, but I just really wondered what the rationale was on that short period of time.

Mr. RODINO. Well, I suppose the rationale or purpose is really to expedite the work. As you will note in the bill, Mr. Moorhead, that the language, in providing that the matter would be voted on within 3 calendar days, provides that this would apply unless such House shall otherwise determine by "ayes" or "nays"; so, therefore there is a saving feature—a feature providing flexibility.

But again, as I stated, I think that since this subject was not considered by the House, and possibly not in this context when it was in the Senate—and I have had considerable discussion with the Senators who have been the authors of the legislation—I think it is the kind of a problem that this committee should really studiously reflect upon.

It was for that reason that I thought we should not just act in haste on what the Senate sent over to us late in the last session, but that this House, and especially this committee, acting with responsibility and yet with dispatch, should take it under advisement.

Mr. MOORHEAD. I understand there are something like 400 pieces of laws triggered into effect by declarations of emergencies.

Mr. RODINO. That is correct, and it's a hodgepodge of matters that were perhaps never coordinated, and just built up, I guess.

Mr. MOORHEAD. Has there been any kind of study to determine just exactly how dependent the Government is on all these things that have been triggered into effect during the years? Whether it is going to

be necessary to get some kind of alternative legislation in some of the areas to take care of this business?

Mr. RODINO. Well, as I pointed out, from time to time it came to be that some of the departments which were affected by some of this legislation came to rely on some of this legislation. Whether or not—again—some of it meets present day needs, and whether or not they would be continued is a question, again.

That's why this committee, I believe, has the responsibility of making this determination whether or not some should not, since they have no further usefulness—they have served their purpose—whether they should be immediately eliminated; and then others would under the provisions of the bill be considered either workable, and be continued.

Mr. MOORHEAD. I heard some of the promotion systems in the Armed Forces were triggered by it.

Mr. RODINO. This is a matter that is being worked on, I understand, in the Armed Services Committee.

I notice that the two distinguished Senators have come in.

Mr. MOORHEAD. Thank you very much.

Mr. FLOWERS. Now I would like to ask the distinguished gentleman from Kentucky if he has any questions of the chairman.

Mr. MAZZOLI. Thank you, Mr. Chairman, I would like to join with my colleague in welcoming the chairman.

I have no direct questions. I was at the earlier discussions that we had in the office with you and the chairman, and we went over some of the areas that will be studied later, and the one the chairman talked about the type of action to be taken in the House, and the time limit, and specification of those seven provisions of law that would be continued because of their apparent emergency, or need.

I think there is further draftsmanship that has to be done, but certainly the outline is here, and that is really what we need to work with.

So, I would state just for the record that I am delighted to see us take this move in connection with emergency powers, in connection with the budget review, and in connection with several bills on foreign policy where the Congress is now sort of mandating it, if you will, the quality that always existed, but sort of has lain fallow for some time.

Thank you, Mr. Chairman, and I look forward to working with you on this.

Mr. RODINO. Thank you, and I would like to state, Mr. Mazzoli, I introduced this because I believe that we need a vehicle. I know the judgment of this committee will be such that it will do that which it believes is in the best interest of expediting the kind of legislation that will be correct, rather than a piece that is accepted because it was presented.

Mr. FLOWERS. The gentleman from Kentucky is also cosponsor with the chairman of the bill. I now ask the distinguished gentleman from New York if he has any questions.

Mr. FISH. Thank you very much, Mr. Chairman. And I join in welcoming the chairman of the full committee, and I wish to compliment him in his initiative on a very necessary piece of legislation. I am very pleased to hear of the cooperation that you received from both the other body, and the executive branch in working toward a legislative vehicle here. Thank you, sir.

Mr. FLOWERS. Thank you, Mr. Fish. Now, our other distinguished gentleman from New York, Mr. Pattison.

Mr. PATTISON. I think it is an excellent bill.

Mr. FLOWERS. Mr. Chairman, you have answered all the questions in advance, apparently, and we will hear from you if you have anything further to say; or we will move on to the next witness.

Mr. RODINO. Thank you very much, Mr. Chairman. I note the presence of the two distinguished Senators who worked very diligently on this matter, Senator Church and Senator Mathias. I, as chairman of the committee, would like to welcome them here, and say that they have always been a great contributing force to that legislative body in the Congress.

Mr. FLOWERS. One of them pulled time on this committee, didn't he?

Mr. RODINO. That's correct.

[The prepared statement of Hon. Peter W. Rodino, Jr., follows:]

STATEMENT OF HON. PETER W. RODINO, JR., A REPRESENTATIVE IN CONGRESS FROM  
THE STATE OF NEW JERSEY

Mr. Chairman, I am pleased that the Subcommittee on Administrative Law and Governmental Relations has initiated these hearings on National Emergencies. It is important that governmental functioning and procedures in emergency situations be understood and subject to Congressional oversight. Further, there is a pressing need for a statutory resolution and definition concerning the exercise of the powers and authorities in connection with national emergencies. A basic assumption in any such legislative consideration is that our Government should function in accordance with regular and normal provisions of law rather than special exceptions and procedures which were intended to be in effect for limited periods to meet specific emergency conditions. We are faced with the situation in which the national emergency declared in December of 1950 by President Truman in connection with the Korean conflict remains in effect. The even earlier national emergency declared by President Roosevelt in March of 1933 to meet the pressing problems of the depression has not been terminated. Two other emergencies are still in effect. There was a national emergency proclaimed by President Nixon on March 23, 1970 because of a Post Office strike, and again on August 15, 1971, a national emergency was declared to deal with balance of payments and other international problems. The time has come for an end of conducting governmental activity under authority of laws which derive force from emergencies declared years in the past to meet problems and situations which have long since disappeared or are now drastically changed. The history of continued and almost routine utilization of such emergency authorities for years after the original crisis has passed serves only to emphasize the fact that there is an urgent need to provide adequate laws to meet our present day needs.

In the last Congress I introduced the bill H.R. 16668 on the subject of National Emergencies, and on October 7, 1974, a similar bill, S. 3957, passed the Senate and was referred to this Committee. While it was not possible to complete consideration of those measures in the last Congress, the committee did receive departmental reports late in the year which indicated general support for the bill as passed by the Senate. The reports contained additional material and background information which may be considered by the subcommittee in connection with the current bill. The bill H.R. 3884, which I have introduced in this session, contains provisions which have been worked out in cooperation with the Senate and I understand that an identical bill will be introduced in that body. H.R. 3884, with two changes, is identical to the bill passed by the Senate last fall. The bill embodies a technical change suggested by the Office of Management and Budget in its report on the earlier bill. The language concerning the termination of the powers and authorities relating to existing emergencies in section 101 of title I of the bill has been modified so that the termination would affect those powers and authorities under emergencies in effect on the date of enactment rather than one year from date of enactment as in the earlier version.

The report the Committee received from the Department of Defense recognized that world conditions and national conditions have changed since the state

of national emergency was declared in 1950. That department stated that it recognized the desirability of terminating existing states of emergency and further stated that it had no objection to their termination. The Department of Defense referred to the fact that some of these emergency authorities had over the years come to be relied upon in the day to day operations of the Department and that these continuing needs would have to be met. The subcommittee will have the opportunity of considering this aspect of the effect of the present bill in its future deliberations.

The report received from the Department of the Treasury on November 12, 1974, should be helpful to the subcommittee in its consideration of the potential impact of the bill upon the authority for the regulations applicable during periods of financial crisis to banks which are members of the Federal Reserve System and the limitations and restrictions on the activities of such banks during those periods. That report also states the position of that department concerning the authority providing for regulation during emergencies of banking transactions, gold and silver activities, transactions in foreign exchange, and the exercise of rights in property subject to American jurisdiction in which foreign nationals have an interest. Some of these matters are of current significance, and therefore the situation merits careful evaluation and study. The Treasury Department has also referred to certain provisions of law concerning current practices in the warehousing of merchandise in bonded warehouses. The subcommittee may desire additional information on this subject.

I would now like to outline the provisions of the bill H.R. 3884. Upon enactment, the bill would be known as the "National Emergencies Act". Title I of the bill provides for the termination after one year of all powers and authorities possessed by the President or other officer or employee of the Federal Government, based upon any declaration of national emergency in effect on the date of enactment. The one year delay is included to provide for a termination from dependence upon emergency authority to utilization of procedures under permanent law and under new enactments drafted to meet the present day needs and requirements. In my opinion to do otherwise would have a serious disruptive effect in certain governmental activity. Subsection (b) of section 1 contains a definition of the term "any national emergency in effect" as it relates to the section.

Title II of the bill concerns the declaration of future national emergencies. I feel that in the future our laws should define and clarify the nature or effect of national emergencies. The provisions of this title of the bill are included to insure that the Congress will exercise continuing oversight in connection with any future emergencies. Section 201 concerns the presidential proclamations of a national emergency and authorizes such proclamations upon a finding that it is essential to the preservation, protection and defense of the Constitution or to the common defense, safety or well-being of the territory or people of the United States. The proclamation would be immediately transmitted to the Congress and published in the Federal Register. Subsection (b) limits the effectiveness of provisions of law to be exercised during a national emergency to periods when a President's declaration of national emergency is in effect and then only in accordance with the balance of the provisions of the bill. This latter provision has particular reference to the provision of section 401 which requires that the President specify the provisions of law he will utilize or under which other officers of the Government will act. Subsection (b) also contains a provision stating that no subsequent enactment will supersede the title unless it does so in specific terms declaring that the new law supersedes the provisions of the title.

Section 202(a) provides for the termination of national emergencies declared by the President in accordance with Title II of the bill. They would be terminated by concurrent resolution of the Congress or by a proclamation by the President. The section contains an additional requirement that at the end of each year following the declaration of an emergency which is still in effect, the President shall publish in the Federal Register and transmit to the Congress a notice stating that the emergency is still in effect.

Subsections (b) and (c) of Section 202 detail the priority procedures which will govern the consideration in the Congress of a concurrent resolution which would terminate a national emergency. These provisions parallel those set forth in section 7 of Public Law 93-148, the War Powers Act of November 7, 1973. Subsection (b) provides that not later than six months after a national emergency is declared, and then after each following six-month period during the continuance of an emergency, each House of Congress shall meet to consider a vote on a concurrent resolution to determine whether that emergency shall be termi-

nated. It is further provided that in either House a concurrent resolution to terminate a national emergency declared by the President shall be referred to the appropriate committee and a resolution is to be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays. Upon being reported, the concurrent resolution shall become the pending business of the House in question and shall be voted on within three calendar days, unless such House shall otherwise determine by yeas and nays. Upon passage by one House, the concurrent resolution is to be referred to the appropriate committee of the other House and it similarly would be required to be reported out in fifteen calendar days. It would become the pending business of that House and be voted upon within three calendar days unless otherwise determined by that House by vote of the yeas and nays.

In the event of disagreement between the two Houses on the concurrent resolution passed by both, the bill would require that conferees be promptly appointed and their report filed within six days and the House would be required to act within six calendar days thereafter. Should the conferees disagree within forty-eight hours they are to report back to their respective Houses in disagreement. These provisions of subsection 202(c) are stated to be an exercise of the rule-making power of the House and Senate, and the constitutional power of either House to change its rules is specifically recognized in the bill.

Section 301 specifies that powers and authorities under any law which become effective during a war are to be effective from the date of the declaration of war.

Section 401 contains the provision I have already referred to, that is, that powers and authorities made available by statute for use during national emergencies are effective after a declaration of national emergency only after the President specifies the specific provisions of such laws which will be utilized.

Section 501 details the accountability and reporting requirements applicable to the President in connection with national emergencies. All significant orders of the President shall be filed and an index maintained on that file. Further, each Executive agency is to maintain a file and an index of all rules and regulations issued during an emergency or war. These orders, rules, and regulations are to be transmitted to the Congress. Subsection (c) requires that the President transmit to the Congress within thirty days of the end of each three month period after declaration of a national emergency or declaration of war a report of the total expenditures of the Government attributable to the exercise of powers and authorities brought into force by the declaration. A final report of all such expenditures is required within thirty days of the termination of the war or the emergency.

Title VI provides for the repeal of provisions of seven laws which have been found to be superseded or obsolescent, and the continuation in effect of certain other provisions that have been deemed to be important to Government operation. I have noted that the departmental reports have commented upon this aspect of the bill, and further testimony in connection with the contemplated hearings on the bill will clarify the circumstances which prompted the inclusion of these provisions.

The facts and the needs I have outlined demonstrate the need for legislative action. As is the case with most important matters, the resolution of the various questions involved in such basic and significant legislation is not a simple matter. However, I am impressed with the cooperation and understanding we have experienced in working with the Senate and in our contacts with the executive departments in connection with the subject, and I am pleased that there is general agreement that the time has come for positive and constructive legislative action.

Mr. FLOWERS. I certainly join our distinguished chairman in welcoming you two gentlemen from the other side of the Capitol. We all feel like we know you well, and certainly by your excellent reputation and the work you have already done in connection with this legislation.

I believe Senator Mathias is going to speak first, and then Senator Church. I note that you did serve on this committee when you were a Member of the House of Representatives a few years ago, before I had the opportunity of being here. But, it is certainly a pleasure to have you with us.

**TESTIMONY OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR  
FROM THE STATE OF MARYLAND**

Mr. MATHIAS. Thank you very much, Mr. Chairman. It is a pleasure and honor to come back to the committee and find that it is in such excellent hands.

One of the incidents of serving as cochairman of a completely non-partisan committee—which is what our Committee on National Emergencies is—is that the two cochairmen have exactly equal status, and we are never quite sure of who goes first. [Laughter.]

So, having worked out a——

Mr. FLOWERS. I thought that was the "Two to one plus one rule."

Mr. MATHIAS. Well, we worked out sort of an "Alphonse and Gaston, and as a result I have come up with my turn to lead off today.

Mr. Chairman, I have a rather lengthy statement here, which both in deference to your time and my uncertain throat I will ask permission to summarize very briefly, and submit it for the record.

Mr. FLOWERS. We will be delighted to receive your entire statement and ask you to comment as you see fit.

[The prepared statement of Hon. Charles McC. Mathias, Jr., follows:]

**STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE  
STATE OF MARYLAND**

Mr. Chairman and Members of the Judiciary Committee, the old vaudeville act of Mr. Alphonse and Mr. Gaston—in which Mr. Alphonse said "After you, Mr. Gaston," and Mr. Gaston said, "After you, Mr. Alphonse," and the two of them then knocked heads going through the same door—could well have been the pattern for Senator Church and I during the two years we have been the only co-chairmen in the Congress. But I am speaking first because we have worked out our act in another way, alternating in the lead-off position.

In fact it is not only in such formal matters that the Senate Special Committee on National Emergencies an Delegated Emergency Powers has worked things out cooperatively. Every step of the way of our deliberations has been marked by a unanimity customary for the declaration of National Peanut Week or the fight against hemophilia but highly unusual for significant questions of national policy. It is because of this spirit that Senator Church and I can recommend the National Emergencies Act with such enthusiasm today. Let me briefly review the history of the committee's work in that light.

My own interest in the question of emergency powers developed out of our experience in the Vietnam War and the incursion into Cambodia. It became clear that the President had powers to commit us to warfare without adequate respect for the constitutional requirement that Congress alone can declare a state of war. During the years 1969 to 1972, particularly, I introduced or cosponsored numerous bills to repeal Congressional resolutions in support of the President's actions, for example, in Formosa or the Gulf of Tonkin. In 1971, I submitted Senate Concurrent Resolution 27 to establish a special joint committee to study the effect of terminating the first state of emergency we found in existence, that declared by President Truman in 1950 during the Korean War. Then on May 23, 1972 I introduced, with Senator Church's co-sponsorship, Senate Resolution 304, which called for the creation of the Senate Special Committee on the Termination of the National Emergency. The committee was to be empowered "to conduct a study and investigation with respect to the termination of the 1950 emergency," to consider problems which might arise as the result of the termination and to consider what administrative or legislative actions might be necessary.

S. Res. 304 was the subject of hearings before the Senate Foreign Relations Committee to which it was referred. On June 13, 1972, this resolution was reported favorably after hearings and executive reports. The bill was subsequently passed and on September 18 Senators Church, Hart, Pell, Stevenson, Mathias, Hansen, Pearson and Case were appointed—an equal number of Ma-



jority and Minority members—and Senator Church and I became co-chairmen. On January 8, 1973 the committee began its work under the authority of S. Res. 9 in the 93rd Congress.

It might be useful at this point if I would take you back to our perspective at that time. We knew that the Truman Korean War Emergency was still in existence and that 200 other special powers had accrued to the President over the years. We knew, for example, that President Johnson had used emergency powers in January, 1968, to control American investments abroad in an effort to ease that year's balance-of-payments crisis, and that President Nixon had invoked the same authority in February, 1971, to suspend the provisions of the Davis-Bacon Act. We also knew that President Nixon had invoked emergency powers in August, 1971, to meet balance-of-payments problems. But we did not know the full story. Like a child with a follow-the-numbers picture puzzle, we were only beginning to move from dot to dot and see the outlines of the subject.

We did know that some authorities of enormous breadth existed, and I remember quoting at the time from Professor Duane Lockard, chairman of the Department of Politics at Princeton, that:

"In essence the Presidency has become an elective kingship with decisive power in a broad range of matters. . . . He can start a war or end one; he can breathe life into a domestic project or smother it."

Let me tell you about just one of the authorities we discovered which illustrate the point.

In 1917 the Congress passed the Trading with the Enemy Act which shifted from Congress to the President the power to regulate trade and financial transactions between Americans and foreigners in wartime. Then came May 9, 1933. The American monetary system was in trouble. Americans were withdrawing deposits from the banks at a panic rate, threatening the collapse of the banking system. President Roosevelt convened the Congress and demanded, in effect, that it revamp the Constitution before midnight. The purpose of the Congressional action was to legitimize retroactively the Bank Holiday proclaimed three days before and the vehicle was to be an amendment to Section 5b of the Trading with the Enemy Act giving the power to the President to regulate commerce in peacetime as well as during war.

An omnibus bill was referred to the Banking and Currency Committee with instructions that it be reported out in one hour. It was not printed and was not available for the Senators to read. Senator Long complained that he did not know what was in it until it was read by the clerk. Most Senators indicated they had grave reservations about the bill's provisions but in the crisis the bill was passed anyway before midnight by both houses. The bill has been used ever since to regulate many aspects of foreign trade and international monetary control. It is, in fact, one of those authorities so crucial to the executive that we have not undertaken to place it under the authority of the National Emergencies Act before you. While this may be an extreme example, much of our emergency legislation has been drafted by the Executive Branch and passed in just such a crisis atmosphere.

When the committee was established we immediately began a survey to determine the scope of existing law. We met with Attorney General Kleindienst and enlisted the cooperation of the Department of Justice. A special task force was established in the White House to look into the question of emergency powers. We began working with the Senate committees having standing authority over the pertinent legislation and began a process of keeping your committee abreast of all that we were doing.

Discovering the scope of existing law proved to be a problem. Nowhere in the executive branch or in the Library of Congress was there a compendium of national emergency legislation. In the past, the only way to compile a catalog useful to Congress would have required going through every page of the 86 volumes of the Statutes-at-Large. Fortunately, the U.S. Code was put into computer tapes by the U.S. Air Force in the so-called LITE system, which is located at a military facility in the State of Colorado. The Special Committee devised several programs for computer searches based on a wide spectrum of key words and phrases contained in typical provisions of law which delegate extraordinary powers. Examples of some trigger words are "national emergency," "war," "national defense," "invasion," "insurrection," etc.

These programs resulted in several thousand citations. At this point, the Special Committee and Library of Congress staffs went through the printouts,

separating out all those provisions of the U.S. Code most relevant to war or national emergency, and weeding out those provisions of a trivial or extremely remote nature. Two separate teams worked on the computer printouts and the results were put together in a third basic list of U.S. Code citations.

To determine legislative intent, the U.S. Code citations were then hand checked against the Statutes-at-Large, the Reports of Standing Committees of the U.S. Senate and House of Representatives and, where applicable, Reports of Senate and House Conferences.

In addition, the laws passed since the publishing of the 1970 Code were checked and relevant citations were added to the master list. The compilation was then checked against existing official catalogs of the Department of Defense, the Office of Emergency Planning, and a 1962 House Judiciary Committee synopsis of emergency powers. The result was a compilation and commentary on 470 special statutes invocable by the President during a time of declared national emergency.

I should point out exactly how the 470 statutes were identified. All the statutes covered by the National Emergencies Act are characterized by their requiring that the President proclaim a state of national emergency or a state of war to be operative. This excludes some legislation which was passed during a time of emergency and was originally intended only for that purpose but nonetheless continues in force to this day. An example of this is the Feed and Forage Act of 1861 which was passed to enable the cavalry in the American West to buy feed for their horses when Congress was out of session. Since then the President has invoked the authority of this Act to expend millions of dollars without benefit of Congressional action. During the Vietnam War and during the Berlin Airlift, the Department of Defense used the law repeatedly to fund military activities not authorized by Congress.

These hundreds of statutes clothe the President with virtually unlimited powers with which he can affect the lives of American citizens in a host of all-encompassing ways. This vast range of powers, taken together, confers enough authority on the President to rule the country without reference to normal constitutional processes.

Under the authority delegated by these statutes, the President may: seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens.

A review of these emergency statutes reveals a consistent pattern of law-making by which Congress, through its own actions, has transferred this awesome power to the Executive, ostensibly to meet the problems of governing effectively in times of great crisis. No charge can be sustained that the Executive branch usurped these powers from the Legislative branch. The contrary is true: the transfer has been routinely mandated by Congress itself in response to the exigencies of war and other grave emergencies.

A few examples from the 470 emergency statutes now in force should make it clear what kinds of extraordinary discretionary power have been delegated to the President:

Statute 10 USC 712 permits the President "during a war or a declared national emergency" to "detail members of the Army, Navy, Air Force, and Marine Corps to assist in military matters" in any foreign country.

Under 10 USC 333, the President can use the militia or armed forces to suppress "conspiracy," if it is likely that "any part" of the people in a state will be deprived of some constitutional right, and the state itself refuses to act. Under this statute, the President conceivably could circumvent Article IV, Section 4, of the Constitution even before waiting for state legislatures or state executives to request Federal troops.

Under 18 USC 1383, the President has authority to declare any part or all of the United States military zones. People in such zones can be jailed for a year for violating any "executive order of the President." Would these arrests be reviewable in court? It is not clear. Judicial review of agency actions is guaranteed in 5 USC 702, but 5 USC 701 excludes actions taken under declarations of martial law.

A President could make use of Public Law 733, which expresses the determination of the United States to prevent "by whatever means may be necessary including the use of arms," any "subversive" activities by the government of Cuba.

Under 47 USC 308, the Federal Communications Commission could, during



a national emergency, modify existing broadcast licenses under terms it might prescribe.

Under 47 USC 606, the President can amend "as he sees fit" the rules and regulations of the Federal Communications Commission and, in particular, can "cause the closing of any facility or station for wire communications."

If the President finds the nation "threatened by attack," he could, under 44 USC 1505, cease to publish his regulations in the Federal Register if he determines that it is "impracticable." This could open the way to promulgation of secret laws.

What these examples suggest, and what the magnitude of emergency powers affirm, is that most of these laws do not provide for congressional oversight or termination. There are two reasons which can be adduced as to why this is so. First, few, if any, foresaw that the temporary states of emergency declared in 1933, 1939, 1941, 1950, 1970, and 1971, would become what are now regarded collectively as virtually permanent states of emergency—the 1939 and 1941 emergencies were terminated in 1952. Forty years can, in no way, be defined as a temporary emergency. Second, the various administrations which drafted these laws were uninterested in providing for congressional review, oversight, or termination of these delegated powers which gave to the President such wide-ranging authority.

Consequently, we discovered, as you know, that not one but four states of national emergency are still in force. The national emergency declared by President Franklin D. Roosevelt in March 1933 to meet the problems of the Great Depression has not yet been terminated. The national emergency declared by President Truman in December 1950, to better prosecute the Korean conflict, is still in force. The national emergency proclaimed by President Nixon on March 23, 1970, to handle the Post Office strike, and the August 15, 1971, national emergency to meet balance of payments and other international economic problems of that time are still in force.

The result is that a majority of the people in the United States have lived all of their lives under emergency Government. For four decades normal constitutional processes have not been the rule. The wars, emergencies, and crises of various kinds of the past 40 years, in addition to the growth of the executive branch bureaucracy under the leadership of strong Presidents, and the diminished role of the Congress in the making of policy—these factors have all contributed to the erosion of constitutional government.

Constitutional government might be further eroded than it is had President Truman succeeded in asserting that the President has "inherent powers" to declare a national emergency and act as he sees fit. During its deliberations, the committee repeatedly referred to the opinion of Justice Jackson in the Youngstown Steel case of 1952. You will recall that President Truman attempted to take over the steel mills during a prolonged strike but was turned back by the Supreme Court. The words of Justice Jackson are worth quoting at some length in the light of the legislation before you.

Speaking for the majority Jackson wrote that "the President's power must stem either from an act of Congress or from the Constitution itself," and said further:

"Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the 'inherent powers' formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

"In the practical working of our government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. . . .

"In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

\* "But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executives be under the law, and that the law be made by parliamentary deliberations."

In our view, Congress should provide statutory guidelines to assure the full operation of constitutional processes in time of war or emergency. This is the best prescription to avoid any future exercise of arbitrary authoritarian power. For as the Youngstown case decided, where there is a statute, the Executive is obliged to use the statutory remedy; where there are no lawful statutory guidelines is to invite so-called inherent powers to come into play. There is without question a need, to provide the executive branch with an effective, workable method for dealing with future emergencies in accord with constitutional processes. The Senate Committee has sought to do this in fulfillment of its mandate.

Mr. MATHIAS. In the statement I have reviewed certain legislation which I have introduced over a period of years, which ultimately led to the establishment of the special committee in the Senate.

As a result of the establishment of that committee, and the leadership that Senator Church and other members gave it, we discovered a lot of interesting facts. One was that there is not only "a state of emergency," but there are in fact several states of emergency, with substantial powers which have been utilized by various Presidents.

President Johnson, for example, used emergency powers in 1968 to control American investments abroad. President Nixon in February of 1971 suspended the provisions of the Davis-Bacon Act. Again, President Nixon in 1971 to meet the balance-of-payments problems.

But even with all of this we did not get the full picture, and we have to begin to fill in what was available. One of the key factors was the 1917 Trading With the Enemy Act, which shifted from Congress to the President the power to regulate trade and financial transaction between Americans and foreigners in war time—in war time, that is the key phrase. And in the great depression the first keystone of "The New Deal" was, in fact, an amendment to that 1917 legislation, which gave the President extraordinary powers to regulate commerce in peace time, as well as in war time.

And this is, I suppose, the genesis of this whole emergency powers treatment of the presidency. That particular bill has been used ever since to regulate many aspects of foreign trade and financial transactions.

But I think that bill also is a good place to start our discussion because it illustrates the difficulty of ascertaining the scope of existing law. Now, fortunately, the United States Code has been put into a computer by the U.S. Air Force; of all institutions we would think it would have been the Department of Justice, or the Library of Congress, but it was in fact the Air Force.

And through the very splendid cooperation of then Secretary of Defense Laird, we got access to the Air Force's computer, and we were able to use the computer by utilizing certain trigger words, such as, national emergency, war, national defense, invasion, insurrection, and similar words. And this computer programing resulted in several thousand citations. At this point both the special committee staff and the Library of Congress went through the printouts, separated all those provisions in the code that were most relevant to war and na-

tional emergency, and eliminated the trivial, or the tangentially related ones. And we further researched this printout and came out, finally, with 470 statutes that we considered to be significant emergency power grants.

These nearly 500 statutes clothes the President with virtually unlimited powers in some cases which could affect the lives of American citizens in a host of all-encompassing ways. This range of powers, taken together, confers enough authority on the President to rule the country without reference to normal constitutional processes; and it's just that serious.

A review of the passage of these statutes revealed a consistent pattern by which Congress, by its own actions, had transferred this power to the Executive, ostensibly to meet the problems of governing effectively in a time of crisis. But the powers have outlasted the crises, and that is the situation that we are trying to confront by this legislation.

Let me give you just one example, that under title 10, United States Code, section 712, the President is permitted during a war or declared national emergency to detail members of the Army, Navy, Air Force, and Marine Corps to assist in military matters in any foreign country. I don't think I have to elaborate on the significance of that in a generation such as ours.

Under 10 U.S.C. 333, the President can use the militia or Armed Forces to suppress conspiracy, if it is likely that any part of the people in a State will be deprived of some constitutional right, and the State itself refuses to act. Of course, this could have enormous consequences.

One of the most radical of these powers is 18 U.S.C. 1383, in which the President has authority to declare any part of the United States as military zones. And people in such zones can be jailed for a year for violating any Executive order of the President. Now, it's not clear whether such arrests would be reviewable by the court. It's not clear whether a court could act within a time to make such review meaningful. But those are just several examples, to which I could add 47 U.S.C. 308, under which the Federal Communications Commission could during a national emergency, modify existing broadcast licenses under any terms it might prescribe, completely taking over the legislative function. Or, under 47 U.S.C. 606, the President can amend as he sees fit the rules and regulations of the Federal Communications Commission.

And if this committee had not acted in another situation as promptly as it did, that might have been a power that might have been used in a very dangerous fashion.

Well, Mr. Chairman, I rely on what I have said, and on the written statement which I present. But I think there is a forceful case to be made for consideration of this subject.

Mr. FLOWERS. Thank you very much, Senator. Your statement, of course, in totality, has been received.

You and the distinguished Senator with you have certainly shown your leadership in this regard, and we will profit greatly by the work that has been done by your special subcommittee.

I ask the gentleman from California if he has any questions.

Mr. MOORHEAD. Senator, thank you for coming over to our House today, and we very much appreciate the work you have put in this important piece of legislation.

There are a few questions I would like to ask about it, however. In the Senate the special committee studied the problems and came up with this bill at the end of the hearings; is that right?

Mr. MATHIAS. That's correct.

Mr. MOORHEAD. Have there been hearings on the specific legislation itself, the wording of the legislation?

Mr. MATHIAS. We held hearings prior to the formulation of the legislation. We did not hold any hearings on the final language as drafted.

Mr. MOORHEAD. Does this particular bill have any effect on the Federal disaster relief program?

Mr. MATHIAS. I would not see that it would have any impact on disaster relief.

Mr. MOORHEAD. Section 101(a) terminates the powers and authorities exercised by the President and other executive officials as a result of a national emergency 1 year from the date of enactment. In effect, are we terminating all four national emergencies that have been declared and are still in existence?

Mr. MATHIAS. That would be the effect of this bill.

Mr. MOORHEAD. Do we wait a year for that, from now, or would it be terminated at once?

Mr. MATHIAS. It would be a year from now. And let me explain that grace period. That was worked out by Senator Church and myself with President Ford. We had originally thought of a somewhat shorter grace period.

It would give the executive branch a full year in which to consider if there are any of the powers, the emergency powers that are comprehended within the scope of the bill, which the administration feels ought to in fact become part of the regular power of the Presidency; and to give the Executive an opportunity to come to the Congress and say, "Let us put this particular power in the normal function of the President," which is subject to congressional oversight, and congressional budgetary procedure. That was why we left that period of a year.

This is not trying to wrest any powers away from the President, but to work cooperatively with the President in returning this country to a peaceful state. Both at law and in fact.

Mr. MOORHEAD. That goes to one possible question that could come up. What if the President believes it is a national emergency, and the Congress does not? Is there a method described here for Congress to terminate that?

Mr. MATHIAS. That of course is precisely what we have had to grapple with, that the President in the exercise of his Executive function could proclaim a national emergency, and the Congress would then review the facts upon which the proclamation was predicated; and if in effect the facts did not justify the continuation of emergency powers, would not agree to prolong the existence of the emergency.

Mr. MOORHEAD. In section 101(b) is the phrase "any national emergency in effect means a general declaration of emergency made by the President pursuant to a statute authorizing him to declare a national emergency."

Does that cover everything, every situation under which there could be a Presidential declaration?

Mr. MATHIAS. Perhaps Senator Church would like to comment in depth on this, but we did review this possibility of defining what national emergencies might be comprehended; and we decided you would cause more trouble by trying to define it than just saying "national emergency", whether you are talking about a physical emergency, or a physical invasion of the land; or are you talking about some environmental disaster that may overcome the country.

We felt it would be wrong to try to circumscribe with words with what conditions a President might be confronted.

Mr. CHURCH. I just want to add, Congressman Moorhead, once we got into that thicket it became evident that we would be creating more problems than we would be solving. And since the likelihood in the future is that Congress will perceive an emergency when the President does, we were principally concerned in establishing statutory procedures to govern future emergencies that would insure Congress the proper legislative role.

Presently the declaration of a national emergency is left entirely to the President. Vast powers can be triggered by such a declaration, and Congress has no method to pass judgment as to the nature, the extent of the emergency, nor its duration. We think that this bill remedies all of those present deficiencies in the law.

Mr. MOORHEAD. There is one question that I raised, or referred to Chairman Rodino. I'm a little bit curious whether it is necessary under this legislation to specifically tell either the Senate or the House how the resolution should be handled. In other words, if a resolution is passed, say, by the Senate and comes to the House, the committee to which it is referred has only 15 days in which to act on the resolution. They have no discretionary power whatsoever, as I understand it, in the referral.

And the House has 3 days in which to act, unless by majority vote they put it off.

Is there a real necessity that the House or the Senate be told how they should handle such a resolution if the other body has acted on it?

Mr. CHURCH. Perhaps there is a larger necessity in the Senate than in the House. Our major concern was that if the Congress felt strongly, or if there was a sufficient number in the Congress who believed that some future national emergency was quite unjustified and was being used by a President as the vehicle for triggering vast executive powers, and imposing Government by Executive order upon the American people, there ought to be some assurance in the law that that matter should come to a vote in both Houses.

We have greater difficulty in that regard because of our rule of debate.

Mr. MOORHEAD. That process is being reduced.

Mr. MATHIAS. That problem may be less tomorrow than it is today, but it will still be there.

Mr. CHURCH. It will still be there.

So, we want to put these provisions in and make certain that in that eventuality it would be assured that both Houses could come to a vote on the question of the emergency and its extension.

Mr. MOORHEAD. Under title III on declarations of war, what was the purpose of putting this provision in the bill? Also, is it consistent with the War Powers Act that was passed last year?

Mr. CHURCH. I think it's not inconsistent with that provision. As I recall, we thought that some language would be needed in the bill to make clear that national emergencies can be put into effect in different ways; the President may declare them, or the Congress by a declaration of war create a national emergency. And whatever emergency powers exist in the law would then be made available to the Executive. That was the purpose, as I recall, for including the language, simply to make it clear that among the emergencies we had in mind of course was the congressional prerogative creating emergency through a declaration of war.

Mr. MATHIAS. It would be really redundant to leave any question in anyone's mind that after a declaration of war the President would thereafter also have to declare a national emergency. That just removes any question about that.

Mr. MOORHEAD. In section 501(c) you have a reporting requirement set forth, that the President within 90 days report to the Congress total expenditures related to the emergency.

Could the total expenditure language be in effect a loophole? Should there be a more detailed breakdown?

Mr. CHURCH. I'm not personally wedded to the language here, it may very well be that the committee could find more exact language that would improve the bill.

Mr. MOORHEAD. We have a whole list of statutes here, some of these are to be repealed, and some are listed to be continued. Can you tell me how you selected those particular statutes?

Mr. MATHIAS. That was done by agreement with the Executive. The ones to be repealed are ones that are clearly obsolete, clearly ones that have no relevance at all to our time and our Government, and ones that everyone agreed should be repealed.

The ones that are excepted, or the ones that were particularly requested by the President to be excepted because he felt they were so vital to the operation of Government at this time that he didn't want to take a chance that they might not be extended, or revised during the 1-year grace period.

Mr. CHURCH. Let me say this, we wrote these exceptions into the law with very considerable misgivings. We would have preferred the original Senate bill which would in effect have terminated all emergency powers that under the old Emergency Act of 1933 are still in effect. That would have had the effect of repealing all those old emergencies, giving the Executive 1 year, then, in which to come to the Congress and say, "Among the emergency powers we think certain powers should be written into permanent law," and allow the Congress then to make the decision.

But in order to reach an accommodation that would permit unanimous action in the Senate and give the promise of a Presidential signature, we did make these exceptions. They thought these particular laws were so vital, they didn't want them placed in a questionable status.

I would hope that this committee, after it gives close consideration to the whole question, would avoid extending the exceptions. To the extent that you start extending the exceptions, you begin undercutting the whole purpose of the effort, which is to return the Government to normal on a constitutional basis, and restore to the Congress its full role in the legislative branch.

Mr. MOORHEAD. That comes to another point. I understand that the Defense Department is interested in having that list expanded.

Mr. CHURCH. Yes, and I think other executive agencies, the more they look at it, the more they will be inclined to add additional emergency statutes they would like to have excepted; but I believe that would be a serious mistake.

Mr. MOORHEAD. Well, I would presume when we look at the list we will be able to exclude some items, or one or two we might feel they should add; perhaps the committee should make that judgment.

Mr. CHURCH. Of course, I was simply expressing my own personal view after we had worked this bill into its present shape.

Mr. MATTHIAS. We would really personally, both of us, prefer to see these operate within the year's grace period, and then let them be voted up or down by the Congress. We only did it, as Senator Church said, out of our concern that the bill be passed in a posture the President would approve.

Mr. MOORHEAD. Thank you.

Mr. FLOWERS. Let me say something to the matter of procedural departure that I guess I set up here: the members who have not yet had a shot at Senator Matthias, I would ask them to hold, and we will ask Senator Church to go forward with his statement.

#### TESTIMONY OF HON. FRANK CHURCH, A U.S. SENATOR FROM THE STATE OF IDAHO

Mr. CHURCH. Mr. Chairman, I think this is very kind and I appreciate your giving me equal time, but actually—

Mr. FLOWERS. I should have done this initially.

Mr. CHURCH. Actually, to expedite your work, Mr. Chairman, if I submitted my written statement, we could spend our time with questions.

Mr. FLOWERS. It will certainly be received, Senator, and thank you and Senator Matthias for your excellent work on this effort which was needed for a long time, and that you have so forcefully brought to attention.

If you want to summarize your statement?

Mr. CHURCH. I would like to make one statement, Mr. Chairman.

Shortly after we began to investigate this whole problem of emergency powers, and began to ascertain how very large these powers were and how if a President chose to invoke the powers, he could really usurp the Congress and govern the country by Presidential edict.

It became apparent to us that if we were ever to get back to a normal constitutional balance, and put these emergency powers on the shelf until genuine new emergencies arose; if we were ever to control the declarations of emergencies and put the Congress in a position to participate in those decisions in the future, we would have to secure a Presidential acquiescence inasmuch as his veto in all likelihood could never be overridden in matters of this kind.

And that is why we did make concessions, and tried to cooperate very closely with the Executive. That is why we organized our committee on a clearly bipartisan basis. And we were able to secure a



Presidential agreement that in principle he would be willing to cooperate in putting into effect legislation of this kind.

So, I believe this is a workable way to get back on the rails again, and I do think that it is a terribly important matter, if we are to restore the Congress to its constitutional role.

Mr. FLOWERS. Thank you very much, Senator.

Mr. MAZZOLI, do you have any questions?

Mr. MAZZOLI. Thank you, Mr. Chairman, I would; and I thank the Senators for their excellent testimony. I just have a couple very brief questions.

As I understand from Chairman Rodino's testimony, Senator, he indicated the form of concurrent resolution in the emergency would be to continue or to terminate.

Now, is it your understanding it could be drafted in either form, or would it be drafted in one form, that is to provide for termination, which would, if it was defeated, mean a continuance. I'm curious about this, just what is intended, Senator Church.

Mr. CHURCH. As I recall, our original bill would have limited any future emergency to 6 months, at the end of which the Congress would have to act in order to extend the emergency. So, we were thinking then primarily in terms of an affirmative action by the Congress to extend the emergency, in which case it could not be extended for more than a 6-month period.

We had in mind the rather dramatic illustration of the Second World War in England, where the Parliament—much more mindful of a long struggle with the King to secure its own prerogative—restricted the Emergency Act to 30 days at a time, even when England was hanging by a slender thread, the Parliament was unwilling to concede these powers to the executive for more than 30 days at a time.

We thought 6 months was a reasonable period, and we wrote the bill in that fashion. The Executive took exception to this, and in trying to work out an acceptable formula we changed the bill so that now what is really contemplated is a negative action. The President would declare the emergency, but the Congress would have the power to terminate it.

Mr. MAZZOLI. Right.

Mr. CHURCH. Which procedure would assure the opportunity for a vote.

Mr. MAZZOLI. Which vote of course, if it failed, would be a round-about way of saying the emergency continued.

Mr. CHURCH. Yes, continued.

Mr. MAZZOLI. Thank you, Senator. either one, whichever might feel—on page 2 of the bill, the definition, I guess, "any national emergency in effect", line 12, "means a general declaration of emergency made by the President pursuant to a statute authorizing him to declare a national emergency."

Now, I'm curious, does that simply refer to title II, the President, pursuant to statute authorizing him to declare a national emergency, is that in effect a reference to title II?

Mr. MATHIAS. There are other authorities, beyond title II, which refer to the President's proclamation of emergency.

Mr. MAZZOLI. And then, Senator Mathias has led me to the other question, in your judgment, would the four existing emergencies that



are on the book now still be emergencies or at least be the basis on which a President could declare an emergency under this law if it is in effect?

Mr. MATHIAS. These emergencies could terminate 1 year from the effective date of the act.

Mr. MAZZOLI. And if they had—I guess what I'm trying to drive at is, would this law that we now have before us, contemplate economic as well as military?

Mr. MATHIAS. Yes; and that is why we did not, as I said to Mr. Moorhead earlier, why we didn't attempt to define it specifically because we were afraid we would circumscribe the President's constitutional powers.

Mr. CHURCH. We were faced with a technical problem here. Given the state of the existing law, the President does have and has exercised the authority to declare an emergency, and it was not entirely clear that the Congress could repeal a declared emergency without the concurrence of the President. And we thought rather than raise that question, we would approach it by simply repealing the statutes that are applicable to those and were triggered by those past declarations. in effect put them back on the shelf. It comes out the same way, and in effect it terminates the existing emergencies and keeps the slate clean.

Mr. MAZZOLI. So, in the event a future President would be confronted by an economic problem, conceivably that could be a basis for his decision, and subject to our judgment, of the Congress?

Mr. CHURCH. Yes.

Mr. MAZZOLI. One final question, Senators. On page 6 of the bill, section 401 indicates that once a President declares a national emergency, there are no powers made available to him, or his people unless he specifies further the provisions of law under which he would act, or his agents would act.

And I assume, is that not correct, that refers to the 400-plus statutes that are strewn around. And if that assumption is correct, my other question is, would there be, would there be a continuation of these laws, and would that be published?

Mr. CHURCH. One of our proudest accomplishments, when your committee was engaged in weightier matters, was to prepare a compendium of these statutes which we believe should be repealed. The Justice Department was unable to supply us with such a compendium, and it was only after we found that the code had been computerized by the Air Force that we were able to get the raw material for the code, and then with the help of some very distinguished legal scholars the compendium was completed and published; and it of course is available to your committee.

Mr. MAZZOLI. Thank you very much.

Mr. MATHIAS. I think your counsel, Mr. Shattuck, has a copy. It was a best-selling item for a while.

Mr. MAZZOLI. Thank you very much.

Mr. FLOWERS. Mr. Fish?

Mr. FISH. Thank you, Mr. Chairman.

Senators, either one of you that is in good voice—or poor voice—can answer if you wish. Am I to understand that right now, absent this legislation, a national emergency that was triggered in 1933 is still in effect. And that a President of the United States could invoke emer-

gency powers under some 470 separate pieces of legislation right now?

Mr. MATTHIAS. That's correct.

Mr. FISH. I think that makes a strong case for the necessity of this legislation. Title II, entitled "Declaration of Future National Emergencies," under section 201(a), grants the President the initiative to declare a national emergency; and section 202 deals with how it should be terminated. It is to be terminated (1) by the Congress by a concurrent resolution; or (2) when the President issues a proclamation terminating the emergency.

Now, what if there is a disagreement here? Let's say Congress is successful in terminating by concurrent resolution—I gather that is veto-proof—and within a few days the President once again proclaims a national emergency.

Mr. CHURCH. We did consider that possibility and saw no way around it. But we thought in the future, if we reached a point where the Congress and the President were in serious disagreement with respect to the need to continue a national emergency, the majority of both Houses of Congress voted to terminate an existing emergency, it would be very unlikely for the President to turn around and reinstate it through a new declaration.

But of course in the event that he did it would again be the right of the Congress to terminate the second declaration, as it terminated the first.

Mr. FISH. So, that would have reference, then, to section 202(b) which states that "Not later than 6 months after a national emergency is declared each House of Congress shall meet to consider a vote" and "not later" means it would be within 6 months, not outside.

Mr. CHURCH. That's the outside.

Mr. FISH. I suppose that is one of the areas in the relationship between the Federal branches that requires a certain amount of civility and rational behavior.

Mr. MATTHIAS. If a President couldn't summon up this much support in the Congress for the existing emergency condition, it would be unlikely that he could mobilize the country itself to respond to the emergency.

Mr. FISH. I agree with you, I just thought the question ought to be on the record.

One further question. What if the President declared a national emergency within the 1 year grace period spelled out in the legislation?

Mr. MATTHIAS. I think it would be clearly subject to all the provisions of the act.

Mr. CHURCH. I do, too.

Mr. MATTHIAS. The 1-year grace period really relates only to the four existing states of emergency that have previously been declared.

Mr. CHURCH. This was our intention. And if you find that the working of the bill leaves this matter ambiguous, I think it should be clarified.

But our intention was the bill should take effect in all respects, except for the shelving of the emergency powers at the time of its enactment. The grace period was to enable the President to come up and plead the case with Congress for converting such emergency powers as he felt ought to be written into permanent law before they were

shelved. And for all other purposes, I would think, the effective date would be the date of enactment.

Mr. FISH. Mr. Chairman, I think it is very valuable to have that statement by the principal authors of the legislation on the record.

One final matter refers to title VI. I just regret that only seven existing statutes are repealed, out of the 470 but I understand we will have a chance to examine the balance. I would just like to pose the question, have you in your 2 years of hearings and study of the problem, come up with any suggestions on codification, or simplification, or would it be your preference to repeal more?

Mr. MATHIAS. Yes, I think probably more of them could be repealed and summoned up by Congress at a later date. Again, I refer to what Senator Church said about the necessity for coming to terms with the Executive on this because you can't end the existing emergencies without some Executive cooperation.

But I think we would both wish you well if you could broaden the list of those to be repealed.

Mr. CHURCH. I would like to also mention in this regard that while our list of outright repealers is limited, as you pointed out, Congressman Fish, other laws which ought to be repealed will be dealt with by the House Committee reviewing deadwood legislation; and perhaps they can eliminate further deadwood in the statutes.

Mr. MATHIAS. In the area of repealed laws, of course, is the famous, or perhaps the infamous power of the President to intern American citizens, a statute which the Congress thought at one time it had repealed, but which this committee discovered it had not repealed.

A President can declare an area 1,500 miles within the coastline as a military zone, and can intern citizens as the American Japanese descendants were interned in World War II.

Mr. FISH. I don't want to belabor this, Senator Mathias, but did the testimony in the hearings before your select committee in the Senate reveal whether or not any President has ever invoked those laws?

Mr. MATHIAS. Yes, indeed, they have been. Most of them have been exercised one time or another. Fortunately the exercise was generally related to crises which gave rise to the power. But the mere fact that they are lying there, available for use, is of course a great danger. And it's not just a theoretical danger. The Weimar Republic largely foundered because of the use of emergency powers, not because of inherent defects in the constitution, but because unrevised emergency powers undermined the constitution.

Mr. FISH. Thank you very much.

Mr. FLOWERS. Just to comment; had there been a trial in the Senate last year, there might have been dependence placed upon those.

I call on Mr. Pattison.

Mr. PATTISON. I would just like to say, it is no surprise to me that it was the Army that knew where all the statutes were.

Mr. FLOWERS. The Air Force.

Mr. PATTISON. The Air Force.

Mr. FLOWERS. You have no questions?

Mr. PATTISON. No.

Mr. FLOWERS. Let me say again to both of you distinguished Senators, we appreciate very much the elucidations given us this afternoon, and you certainly show your wealth of knowledge on the subject, and

I think you have brought us up to date with your work the last year; we thank you very much for it.

Mr. CHURCH. Thank you very much, Mr. Chairman, for the opportunity to appear. We are both pleased with the interest you are showing, and the fact that you will be moving ahead with this legislation in an able way.

Mr. FLOWERS. We will certainly do that. I don't know whether it will be in an able way, but we will be moving forward.

Mr. MATHIAS. Mr. Chairman, if there is any way in which either one of us personally can be of assistance, or the staff of the Senate committee can be of assistance, we are on call.

Mr. FLOWERS. Thank you very much, Senators.

Mr. CHURCH. Thank you, Mr. Chairman.

[The prepared statement of Hon. Frank Church follows:]

STATEMENT OF HON. FRANK CHURCH, A U.S. SENATOR FROM THE STATE OF IDAHO

Mr. Chairman, I am pleased to be batting number two in the lineup to Senator Mathias today. The work of this committee has been a particular pleasure for me because of the opportunity to work with Senator Mathias and because of the bipartisanship which has characterized our work from the start. Our work has truly been above partisan considerations and—to a remarkable extent—above the contentions that sometimes exists between the Legislative and Executive branches. Perhaps all of us sense a special need to prepare ourselves for an uncertain future with a most careful regard for the Constitution.

The special committee has held extensive hearings seeking the views and advice of the country's most distinguished authorities on constitutional government in time of crisis. In addition to scholarly authorities in the fields of political science and the law, the special committee sought the counsel of all the former Attorneys General and two former Supreme Court Justices, as well as many distinguished lawyers.

The committee also obtained the views and opinions of each of the three branches about how to best meet the problem of emergency rule. We thought it was particularly necessary to obtain not simply the present day perspective, but also the perspective of those who have served in previous administrations, Congresses, and courts over the past 41 years of emergency rule. It was particularly helpful to have views of those who served as both Attorney General and Supreme Court Justice. We had the opinion, of course, of Justice Jackson in the most important Youngstown Steel case. We are fortunate to have a number of Attorneys General who have served in many capacities and not only in the executive branch. A number of this country's most distinguished law schools have on their faculties men who have served their Government in the executive branch or in the Judiciary or as staff consultants to congressional committees. In addition we sought the advice of each Senate Committee with authority over the pertinent statutes. This broad perspective over the four decades of emergency rule was absolutely vital in order to consider the problem in a context that, of course, would include the immediate concerns of the respective branches but also the test of history and considered reflection on the part of those who have been through the experience and could objectively judge. Many of these views and opinions are contained in the published hearings of the committee. Considerable valuable advice was given in study sessions at law schools or at private meetings held by members of the committee over the past two years.

On the basis of the suggestions and perspective gained from these hearings, and from two intensive staff studies of emergency power statutes and Executive orders, and upon the basis of the data, advice, and counsel supplied by the executive branch, the special committee, working with the executive branch at every step, drafted the legislation now before you. Let me review the bill and give you some of the thinking behind it.

Title I of Chairman Rodino's Bill, H.R. 3584, terminates the four existing declared emergencies one year from the date of enactment of the Act. A minor technical amendment has been made in this title at the request of the Office of Management and Budget, but otherwise it reads as it passed the Senate.

The one year grace period is to allow time for the enactment of permanent authority to replace, where necessary, emergency authority now being used by

the executive. Shorter periods were once considered and at one time this section read "271 days" but the present provision is acceptable to all who have reviewed it.

Title II deals with future national emergencies and begins by defining an emergency as a state wherein the President determines that it is "essential to the preservation, protection and defense of the Constitution, and is essential to the common defense, safety or well-being of the territory and people of the United States." The committee intentionally chose language which would make clear that the authority of the Act was to be reserved for matters which are "essential" to the protection of the Constitution and the people. This authority will not be available for frivolous or partisan matters nor, for that matter, in cases where important but not "essential" problems are at stake. Only in the most unusual circumstances can the Constitutionally ordained role of the Congress be bypassed.

This section also provides that this Act shall constitute the only authority under which a national emergency can be declared and then only in accordance with the Act. Subsequent legislation can supersede this Act only in specific terms and expressly. The President is required to publish his proclamation of a national emergency in the *Federal Register* and transmit it immediately to Congress.

Section 202 contains the crucial sections which detail the role of Congress and, in effect, reclaims Congressional powers now emasculated. But before discussing these sections in detail let me say a word about options we faced.

The special committee could have recommended an outright repeal of the existing emergencies. This, in fact, was the initial inclination of some members of the committee. But after a series of hearings and when the committee had a fuller understanding of the long history of emergency government in the United States and other nations, we came to the conclusion that it would be irresponsible to propose the termination of existing emergencies and the laying dormant of existing powers without providing a means for declaring and terminating future emergencies. We were aware that, for example, Great Britain had fought the entire Second World War under emergency authority given to Prime Minister Churchill only 30 days at a time. We initially thought in terms of 30, 60 or 90 days as the proper length of an emergency without benefit of Congressional concurrence.

The version of the National Emergencies Act first reported by the Senate Government Operations Committee contained a provision in which emergencies were to continue for six months. Moreover, at the end of six months, emergencies were to be automatically terminated unless extended by the Congress. In that event the President would have to proclaim a state of emergency again and, this time obtain Congressional approval only for another six months at a time.

This provision caused concern in the Executive branch. Although we would have preferred the bill as written, a compromise was worked out which the Senate found acceptable. The present formula provides that the President can proclaim a national emergency which could continue indefinitely. However, the Congress may at any time reject by Concurrent Resolution the President's use of these powers. Moreover, provisions were written into the Act which give every possible assurance that the Congress will vote aye or nay on the continuation of the emergency at the end of six months and at six month intervals thereafter. While a statute cannot require that the two Houses vote, it can provide special rules to help assure a vote.

The Act requires that a resolution to terminate a national emergency shall be referred to the appropriate committee of the House or the Senate and that one such concurrent resolution shall be reported out by such committee together with its recommendation within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays. Any concurrent resolution so reported shall become the pending business of the House in question and shall be voted on within three calendar days unless otherwise determined by yeas and nays. Provision is made to make a resolution passed by one House the pending business of the other within three calendar days. In the event of a disagreement the committee of conference is required to file its report within six calendar days after referral and the resolution must be acted on by both Houses not later than another six days. These rules are specifically designated as an exercise of the rulemaking powers of the Senate and the House and deemed a part of the rules.

Title IV is the next major section and it provides that the President must specify the provisions of law under which he intends to act and restates a pro-

vision in Title I requiring publication of declarations and executive orders in the Federal Register. Title V requires an extensive system of record keeping by the President and executive agencies so that the Congress and the public may know what actions are taking place. All significant orders must be transmitted to the Congress and after each three month period during an emergency the President must report to the Congress all expenditures incurred by the government during that period. After an emergency a final report of expenditures must be filed.

Title VI contains two sections. Section 601 repeals statutes which both the Executive and Legislative branches deem to be obsolete. While the list is not exhaustive, the remainder will be dealt with by the House Committee reviewing deadwood legislation, the Committee on Law Revision.

Section 602 exempts from the provision of the National Emergencies Act six statutes that the Executive branch found so crucial to the continued operation of the government as to require their continuation. All other emergency statutes are made dormant by the provisions of Title III but the six statutes in this section continue in full force. This section, too, is the result of compromise. While we would have preferred to cover all emergency statutes, the course agreed to calls the attention of each committee of the House and the Senate to the need for permanent law in these areas, and to require that these committees study the pertinent laws and report to its respective House within 270 days.

The most significant statute in Section 602 is the Trading with the Enemies Act Senator Mathias referred to earlier. Another statute relates to the authority of the President to call up the Reserves. Other statutes refer to purchases and contracts for property, assignment of claims and the transfer of contracts.

It has been our feeling that it is appropriate to limit the exceptions to the Act to the smallest possible number of statutes and to press for corrective legislation even in those cases. While important governmental activities are involved, there is little reason to continue as the underpinning of executive action broad emergency authorities such as the Trading with the Enemies Act. I have every confidence that the Congress will act swiftly in every case where practices built up under emergency authority are reasonable and necessary.

Mr. Chairman, by this legislation we have sought to restore the Congress to its original constitutional place in providing for effective government during times of war or severe crisis. We have also sought to assure that each of the branches can use its respective powers and carry out its assigned responsibilities in order to contribute to a common purpose of national security. I believe we have succeeded.

Mr. FLOWERS. We will recess the hearing on this particular matter.

[Whereupon, at 3:15 p.m., the subcommittee adjourned, subject to the call of the Chair.]

# NATIONAL EMERGENCIES ACT

THURSDAY, MARCH 13, 1975

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ADMINISTRATIVE LAW  
AND GOVERNMENTAL RELATIONS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 1:30 p.m. in room 2141, Rayburn House Office Building, Representative Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Danielson, Jordan, Mazzoli, Moorhead, and Fish.

Also present: William P. Shattuck, counsel; Alan F. Coffey, Jr., associate counsel.

Mr. FLOWERS. Gentlemen, we will proceed.

Might I say on behalf of all of the committee, welcome to Mr. Elting Arnold who is senior counselor to the General Counsel of the Treasury; Mr. Stanley Sommerfield, Chief Counsel, Foreign Assets Control; Mr. Dennis O'Connell, attorney in the Office of the General Counsel; and Mr. Arthur Schissel, chief, legislative section, Office of the General Counsel.

I believe we have all of you gentlemen here today, and as you are aware we are continuing our inquiry into H.R. 3884, a bill, "to terminate certain authorities with respect to national emergencies still in effect."

We particularly wanted to hear from Treasury first, of the Departments that would be affected, because we are cognizant of the impact that it might have. Certain procedures that are now in effect as a result of, for instance, the national banking emergency and matters of that sort.

So, without further ado on my own part, unless my colleague from Texas has a word or two, we will proceed to hear you gentlemen.

Ms. JORDAN. No; I just appreciate you gentlemen coming.

Mr. FLOWERS. You may proceed.

TESTIMONY OF ELTING ARNOLD, SENIOR COUNSELOR TO THE GENERAL COUNSEL, U.S. DEPARTMENT OF THE TREASURY, ACCOMPANIED BY STANLEY L. SOMMERFIELD, CHIEF COUNSEL, FOREIGN ASSETS CONTROL; DENNIS M. O'CONNELL, ATTORNEY-ADVISER, OFFICE OF THE GENERAL COUNSEL; AND ARTHUR SCHISSEL, CHIEF, LEGISLATIVE SECTION OF THE GENERAL COUNSEL

Mr. ARNOLD. Mr. Chairman, we are very glad to be here. With your permission I would like to read a brief statement which we have prepared.



It is a pleasure to be here with you today to discuss the proposed National Emergencies Act, H.R. 3884.

As this committee is aware, this legislation is the outcome of 2 years of study and hearings conducted by the Senate Special Committee on the Termination of the National Emergency. The Treasury, as well as other executive agencies, has worked with the special committee in evaluating existing emergency powers and statutes. Among other matters, careful attention was given to the question of which statutes should be repealed as obsolete, which should be recast as permanent legislation, and which should be retained for use on an emergency basis.

The amended version of the Senate national emergencies bill, introduced in the last Congress, which passed the Senate on October 7, 1974, reflected the recommendations of the executive agencies. The Director of the Office of Management and Budget wrote to the chairman of this committee on December 12, 1974, that the Senate measure, as amended, was acceptable to the administration with the exception of one point which has been met in H.R. 3884.

Mr. Chairman, however, I have just been informed that the Office of Management and Budget is currently reviewing the proposed legislation to determine whether any modifications may be required in the opinion of the administration.

With the change just mentioned, H.R. 3884 is substantially identical to the Senate passed bill on which OMB submitted its report in December. The Treasury Department considers that this legislation represents a workable approach to the national emergencies question. Perhaps it may be helpful to highlight features of this bill which the Treasury regards as especially important.

First, the bill provides a full year in which the executive branch and Congress can make the adjustments which may be necessary or desirable in relation to the termination of emergency powers provided for in section 101 of the bill. Given the nature of the legislative process and the number of statutes and programs that may require consideration, this appears to be an entirely reasonable time for the purpose.

Second, the Treasury strongly believes that the exemption of section 5(b) of the Trading With the Enemy Act from the bill's provisions terminating emergency powers is highly desirable. This exemption is essential to the continued effectiveness of the foreign assets control program administered by the Department.

In addition, we believe that section 5(b) should be retained for emergency use to deal with international financial and investment problems that may arise in the future.

With respect to the foreign assets control program, termination of the emergency basis for use of section 5(b) would seriously affect the negotiating position of the United States with regard to controls which regulate transactions with several foreign countries and their nationals. Among other things, these controls freeze significant amounts of Chinese and Cuban assets to be held for an eventual settlement of the claims of U.S. citizens whose property in the Peoples Republic of China and Cuba has been seized without compensation. In this regard, it also appears that constitutional problems might arise with respect to the validity for continued blocking of assets of foreign countries if all national emergencies or authorities thereunder were terminated.



Finally, the provision of the bill providing for termination of future national emergencies by concurrent resolution is, in our judgment, preferable to the original proposals to terminate emergencies at a date certain. We feel that section 202 of the bill provides for adequate congressional control over the period for which future emergency declarations may remain operative, without unnecessary inflexibility.

In sum, the Treasury believes that H.R. 3884 strikes a reasonable balance between the need to resolve questions with respect to emergency powers and the need to preserve flexibility for dealing with crises that may occur in the future.

Mr. FLOWERS. Thank you.

Mr. ARNOLD. Mr. Chairman, we will do our best to answer any questions that the committee may have.

Mr. FLOWERS. Thank you.

Do any of you other gentlemen have a statement at this point, or are you available for questions?

Mr. ARNOLD. This is the only statement.

Mr. FLOWERS. We have a team effort here this afternoon. Very good.

Basically, then, your statement in gist is that you approve of the bill as currently drafted and pending before this subcommittee, which contains the exemptions which you as a Department are interested in. Is that correct?

Mr. ARNOLD. Yes, sir.

Mr. FLOWERS. In that regard, you are talking about the Trading With the Enemy Act, and the Bank Emergency Act?

Mr. ARNOLD. We are primarily. There is a statute relating to customs matters of a relatively incidental nature, which was referred to in our letter to your committee last fall, which has some interest. But it is something that can be solved much more readily than any major change in these other matters.

Mr. FLOWERS. In our discussions with the two prime Senate sponsors last week, and in my own deliberations over this matter in preparation, of course, it occurs. I think, if you are trying to clean up the record book, so to speak, which is what we are trying to do, and I think it needs doing—the best possible solution would be a complete solution; that is, to absolutely terminate all existing emergencies. But you people feel that it is absolutely necessary for these exemptions in your own area?

Mr. ARNOLD. We do, sir.

Mr. FLOWERS. Let us talk about these two particular ones, then. As far as the Trading With the Enemy Act, would there be any alternatives, legislativewise, or would there not be an alternative to exemptions under the provisions of this act?

Mr. ARNOLD. We do not believe, Mr. Chairman, that there is any alternative that could be readily worked out in time to permit expeditious passage of the pending legislation. The technique adopted in the bill, with which we are in accord, is to set aside certain statutes, including section 5(b) of the Trading With the Enemy Act, for prompt subsequent consideration in which the Treasury would be fully prepared to join. But we have not formulated, as of this time, any specific proposals. If the bill passes, we certainly would—and I did not mean to use the “if” in any negative sense—if the bill passes, we would certainly be ready to join with the committee and the Senate in working out, hopefully, some acceptable solution.

Mr. FLOWERS. I do think that is a constructive suggestion.

Now, the other matter of some importance to the Department of the Treasury, the Bank Emergency Act of 1933—it boggles the mind that, here in 1975, that we still find useful to operate in certain respects under a declared emergency in 1933. We do see some similarities on the economic horizons anyway, between 1975 and 1933, that we are concerned about. But what if you can, in summary and briefly, what particular propositions does this enable you to deal with better than you would otherwise?

Mr. ARNOLD. Mr. Chairman, if I understand the situation correctly, and my colleagues may want to correct me here somewhere, the difference on the internal banking side of the matter and the foreign side of the matter with regard to section 5(b) is quite pronounced, quite significant. We are not, at least in any marked degree that I am aware of, depending on the domestic side at this time. The concern that we have is the results or significance of section 5(b) with regard to certain matters in the foreign field, notably the foreign assets control regulations. As I understand the proposed act—the domestic side of 5(b) would not be repealed at this stage. It would be available for use, but its use would be subject to all of the provisions of the act governing the future declaration of emergencies, whereas on the foreign side, we are obliged by the course of history to rely upon an outstanding declaration of emergency, until something better, at least, if there is something better, can be substituted. And this, as I see it, is the essential difference between the two sides of the matter, the domestic and the foreign side.

The act will leave many emergency powers available to the President, to be exercised if and when it is appropriate, in accordance with the terms of the act. That is the situation on the domestic side. It is not the situation on the foreign side.

Mr. FLOWERS. This is largely the statement you submitted in connection with the Senate hearings on the matter, I presume?

Mr. ARNOLD. Yes.

Mr. FLOWERS. I do not have any further questions at this point. I will yield to the gentlelady from Texas for whatever inquiry she would like to make before yielding to the gentleman from California.

Ms. JORDAN. Sir, on page 3 of your statement, I would like for you to educate me on the constitutional problem which could arise without 5(b). You see—your first paragraph? Just educate on that—what problems are you talking about?

Mr. ARNOLD. Yes, we can do that. The problem is the protection of the fifth amendment against the taking of property without due process of law, including proper compensation. Basically, friendly aliens are probably entitled to the same protection of this provision of the Constitution as citizens, and I believe that this was cited in substance in the *Russian Volunteer Fleet* case, 282 U.S. 481.

However, the situation is different with regard to the blocking of property in time of emergency. This matter was litigated in a case a few years ago, *Sardino v. Federal Reserve Bank of New York*, which is 361 Fed. (2d) 106 (1966). And the point, in short, is if blocking were attempted under any other authority or any other theory of law than the existence of an emergency, blocking might prove to be ineffectual constitutionally. As I said earlier, and as my statement indicates, there

are, for example, substantial amounts of Chinese and Cuban assets which should, at least in the opinion of the administration, be held until property settlements can be worked out with the respective countries. Of course, in Cuba, we are not even at the same stage that we are with China, and with China, the principal effect of the controls today is this blocking of existing assets to be held for a property settlement. With Cuba, we still have an active foreign assets control over transactions.

But, looking at this one central aspect, it might be seriously infringed on if there were an instant termination of the emergency. And this is one of the reasons why, in response to the chairman, although I did not mention it specifically, we feel that time is required to work out a solution here, in regard to the blocking controls under section 5(b).

Ms. JORDAN. Did the Court state specifically that the amendment which says you cannot take a person's property without just compensation—did the court say that that proviso specifically applies to friendly aliens, or is that an expanded interpretation of the negotiators with those countries?

Mr. ARNOLD. Mr. Sommerfield, who is with me, is more expert on the decisions specifically than I am. With your permission, I will ask him to respond to that question.

Ms. JORDAN. Please do.

Mr. SOMMERFIELD. The history is that the Supreme Court held, in about 1921, that the Congress and the administration could not take moneys that were due to Russian citizens after the Bolshevik Revolution. It was funds owing for the use by the United States of the volunteer fleet in World War I. After the Bolshevik Revolution, Congress enacted a law providing in effect that we would not pay these Russian citizens, because of the Bolshevik nationalization of American investments in Russia. So that was the standing principle of law applicable to foreign assets in the United States at all times since 1921.

In 1965, we were sued by attorneys for the Cuban regime, and in effect, they relied upon that decision. They said, there is no state of war between the United States and Cuba—indeed, we legally recognize Cuba to this day, although we do not have diplomatic relations with them. Consequently, the argument of the attorneys for the Cubans was that as friendly aliens technically they had a right to have their blocked assets released. We initially responded that a blocking does not “take” the assets. All a blocking does is tie them up, so that they cannot be disposed of without Government authorization. That position was upheld in the lower court in the district court. The court of appeals sustained the decision of the lower court, but on a different theory. That court said, no, when you tie up a foreigner's assets for an indefinite and lengthy period of time, as you have done with respect to Cuba, and for that matter with respect to China, that amounts to a deprivation of property without compensation, and normally you cannot do that, as was held in the *Russian Volunteer Fleet* case.

The court went on to say, however, that the world is no longer the old-fashioned world of black and white. There are some gradations in here; and they said, in effect, a blocking of this type, a “taking” without compensation, is justified only as under an emergency situation. I am not sure they used the words “only under.” They did not use that exact language. But their rationale was, blocking is justified as a reaction to the provocations that the United States underwent when Castro

nationalized American property in Cuba, when Castro had missiles pointed at the United States, where we were at the verge, perhaps, of an invasion of Cuba. In effect, what they said was, in that type of situation, which is essentially an emergency situation, it is constitutional. They even indicated that it might, at a future date, be constitutional in that type of situation to vest the property; not just block it, but take it over and use it to pay American citizens for losses suffered in Cuba.

So, the point that we are concerned about is that in view of this rationale, you need an aura of emergency to justify a continuing blocking or even a vesting of these assets; if we lose the aura of emergency, and we put the blocking restrictions on a permanent nonemergency status, we can run into a good possibility—I do not know whether it is inevitable or not—there is a good possibility that the courts might rely on the precedent of the *Russian Volunteer Fleet* case, and hold that if Congress has determined that there is no emergency. Accordingly there is no emergency, the courts could rule that there is no constitutional justification to take a foreigner's assets, or tie them up indefinitely as we do. This is what we are concerned about.

Ms. JORDAN. Thank you very much. No further questions.

Mr. FLOWERS. Thank you.

The gentleman from California is recognized.

Mr. MOORHEAD. In your statement you indicate the necessity of retaining the powers in the Trading With the Enemy Act as a part of the law. Do you think that they should be made a part of the permanent powers of the President?

Mr. ARNOLD. Mr. Congressman, I do not believe at this stage that the Treasury has a definite view on that. It is pretty obvious in many ways that some power in the executive branch to deal with sudden emergencies involving necessity of imposing blocking controls and the like would be desirable, but it is a subject on which we are not yet ready to express a definite view. We feel that this type of question can best be answered if the bill passes and the respective committee with jurisdiction, and there are several items in the bill that fall in different committees, enters into the matter. At that time it would be appropriate and necessary to face up squarely to the question, but I do not think at the moment that we have a definite answer for you, sir.

Mr. MOORHEAD. I see. Section 602(a) lists the statutes that are exempt from the provisions of the National Emergency Act. What would your reaction be to a time limit on the exemptions of these laws?

Mr. ARNOLD. There is in a sense a time limit, Mr. Congressman, in that the respective committee has to make a report within 270 days. There is not any absolute cut-off but an expedited consideration and presumably, a reasonably definitive report within 270 days is contemplated by the statute.

I believe that we feel that this is enough. I do not believe that we would recommend that there should be any flat cut-off period. The respective committee might conceivably recommend in some cases—there are five or six statutes—it could conceivably recommend a continuation without substantial change. In another case it might recommend flat repeal. We are not experts on the other statutes. I am sure that we would think in case of section 5(b) that some continuance or appropriate substitute should be found. But at this stage we do not

have, as I said, we do not have a definitive recommendation. I do think that the provision for consideration and report within a fixed period is a reasonable procedure under the circumstances.

Mr. MOORHEAD. One thing I was wondering about. In the report to the committee on proposed emergency legislation you indicated a 1-year grace period regarding the termination of emergency authorities would not be sufficient time.

Now you indicate that a 1-year period might be a reasonable period of time.

Mr. ARNOLD. I think there are two different provisions involved here. The 1-year period relates to emergencies that would be terminated by this bill itself, and we thought that there would be time within that 1-year to work out either administratively perhaps in some cases, but more likely by congressional enactment appropriate substitutes where they would be needed. This is the case, for example, of the customs legislation that I mentioned briefly.

However, some more active and, in a sense, more fundamental statutes are covered by section 602 on which I pointed out the 270-day provision and expressed the view that was held by the Department that this would be a reasonable approach.

So we are really considering two different categories of statutes, Mr. Congressman.

Mr. MOORHEAD. Are there any exemptions that you feel should be in the law that are not listed here?

Mr. ARNOLD. No, sir. I mentioned that the Office of Management and Budget is conducting a review. We have not been informed as to what they might have in mind. As far as the Treasury Department is concerned at this time without having the benefit of OMB's views, we are content with the law as it is drafted.

Mr. MOORHEAD. Do you feel that you could live under it without any trouble?

Mr. ARNOLD. We do. We think that, granted a reasonably careful attention under section 602 by the respective committee, we can live with this law.

Mr. MOORHEAD. Thank you very much.

Mr. ARNOLD. Thank you.

Mr. FLOWERS. I recognize the gentleman from Kentucky.

Mr. MAZZOLI. Thank you very much, Mr. Chairman. I apologize for not having been here for the whole extent of the testimony, Mr. Arnold, but I have had a chance to briefly go over it and perhaps you have answered these questions, I guess. That is, having reviewed this, you are satisfied that this provides a workable handling of what obviously is a very intricate and difficult situation.

Is that true?

Mr. ARNOLD. Yes, sir, we do. It is like much legislation. We might have preferences for some more or less restrictive provision here or there, but considering the whole problem and the necessity, or the desirability, of some overall solution, we are in accord with this proposed legislation.

Mr. MAZZOLI. Thank you very much, sir. I appreciate it. Thank you, Mr. Chairman.

Mr. FLOWERS. Thank you, Mr. Mazzoli.

The gentleman from New York.

Mr. FISH. Mr. Chairman, thank you. I appreciate the testimony received and I think it is clear. I do not have any questions to ask the witness.

Mr. FLOWERS. Thank you, Mr. Fish. Gentlemen, I quite frankly do not have any questions. If you will give me a moment to confer with counsel—

Mr. ARNOLD. Certainly. [Pause]

Mr. FLOWERS. I am going to yield to our counsel, Mr. Shattuck, for questions.

Mr. SHATTUCK. I hope I am not entering into an area of conjecture, but in view of your statements as to the necessity of the emergency basis for a blocking of assets under the previous situations that you outlined, what would be the effect of the bill's new provisions concerning a recurrent review of emergencies in terms of assets, if I make myself clear? What would happen if the Congress should have to consider this periodically? If at some point the Congress ended the emergency, then the blockage would end?

Is that a proper conclusion?

Mr. ARNOLD. It might well be, yes, sir. I think that is the logical consequence of reasoning that has been expressed here, or at least the possible logical consequence. Presumably, if the Congress were faced with the question 3 years from now or 5 years, or whatever, in relation to some new blocking under a newly declared emergency it would take this particular factor in account in its decision as to whether or not to terminate the emergency.

I do not believe that I can give you any more specific answer than that. It seems to me that that would just be the inevitable situation.

Mr. SHATTUCK. Thank you. I would like to direct to Mr. Sommerfield a somewhat similar question. As I listened to his answer, he indicated that the court indicated that the situation, as of at the time of the blockage, was significant. Some sort of an emergency situation had to be in existence to justify the blockage or blocking of the account.

That seems to be something that occurred at that time, not a continuing thing, necessarily.

Mr. SOMMERFIELD. No; I do not think so, sir. As I understand it, my opinion would be this. You have to have an emergency declaration, a valid emergency in existence. I do not mean a factual one, but rather, a legal one. That is, you do not have to have Castro aiming missiles at you today. You do not have to have a state of hostility or imminent hostilities in effect.

What you need is a legal emergency on the books. The courts are not going to look behind that, at least they have not so far, and they have indicated they will not, subject, of course, to the possibility of an ultimate Supreme Court decision. But they have indicated so far that they will not look behind the President's declaration of an emergency. The existing emergency is a valid emergency as far as they are concerned. If an emergency exists, you can justify the continued blocking of the assets. If you terminate it, you may not have a constitutional basis for continued blocking.

Mr. SHATTUCK. Thank you.

Mr. FLOWERS. I am going to yield to Mr. Coffey, minority counsel, for a question or two.

Mr. COFFEY. Thank you, Mr. Chairman.

I do not mean to belabor the point, Mr. Sommerfield, but if I could follow up a minute on Mr. Shattuck's question. As I get it, by exempting the Trading With the Enemy Act, we are, in effect, continuing the emergency for the sake of that statute.

Is that your interpretation?

Mr. SOMMERFIELD. You are continuing an emergency which will permit the continued operation of these controls which are now in existence, embargoing Cuba, embargoing North Korea, embargoing North Vietnam, freezing many millions of dollars of Chinese and Cuban assets and controlling strategic shipments to Eastern Europe. The latter one I am sure you could deal with under new legislation without difficulty. You do not need an emergency for that one although it is under this authority at present.

Respecting the other regulations, where there exists, in particular, the freezing of assets, you have to have, as I see it, a continued emergency in existence legally to justify the action and I, in effect, am saying that I think there is a question—I cannot predict how the courts would actually rule but I think there is a question—a risk, and not an insignificant one, that if there were no emergency legally in existence on the books, you could not in a peacetime activity continue to block these assets until you reach some settlement with these countries.

I might add just as a matter of background that the Secretary of State announced about 1972, I believe, or 1971, that we had reached an agreement in principle with the People's Republic of China, for settlement of American claims against China, but that has never been implemented because of negotiating difficulties. If you lost this blocking control you are just letting the Chinese take \$90 million freely out of the United States and hoping you will be able to collect from them, which, without collateral, may be difficult.

Mr. COFFEY. My point would be that under the criterion you set down, a legal emergency must be in effect to justify the continued validity of the blocking.

I would argue, perhaps, that if we passed this bill that there would not be a national emergency legally. In effect, we are exempting the Trading With the Enemy Act from the provisions of this legislation but we are not continuing the emergencies here. You do not see a problem?

Mr. ARNOLD. This is a possibility, sir, but actually, the bill does not terminate the emergencies despite the language used in one title.

Mr. COFFEY. I understand that.

Mr. ARNOLD. It says that existing emergencies are not effective with regard to the various uses; it says they are not effective really with regard to any uses but it exempts from that provision the statutes that are referred to in the last section, section 602.

In truth, we have not focused sharply on the point that you raised. It certainly did not occur to us that there would be any problem in that direction. Since the emergency is not technically terminated, it seems quite appropriate—it does to me as an individual, at least—that Congress should decide that by and large the effect of emergencies will not continue but that there is good reason in a particular field to have the effect continue longer to allow Congress and the administration to consider what to do about the matter.



So, in short, I do not think we do have a worry along the lines of what you have raised.

Mr. COFFEY. All right, fine. You see the powers and authorities language as sufficient for your purposes?

Mr. ARNOLD. Yes, sir.

Mr. COFFEY. One additional question, if I might. That has to do with title V of the bill.

Title V is concerned with the accountability and reporting requirements that the executive agencies and the President will have under the National Emergencies Act. One of the phrases that is used here a number of times, I guess a couple of times, is "all significant orders," and this is a somewhat vague phrase.

I would like to get the reaction of one executive agency that will have to comply with that as to what you feel this really means and what would come under it in your interpretation.

Mr. ARNOLD. I think, speaking very frankly, you have to consider the present draft against the background of some of the earlier proposals, which were considerably more onerous in their reporting requirements. And it seemed to the administration that the new draft was a distinct improvement. Perhaps we have not focused with all carefulness on what would be "significant."

I am inclined to think personally that practically any order by the President would be significant. He does not make many orders on a given subject and when he does it is generally pretty significant that he has made an order.

So I think really that that would work out pretty well just in practice, that one would tend to list all of the orders of the President most likely. I do not want to say that flatly. That is not a clear thing. But it would seem to me to tend to go that way in fact.

Could I interject one thing? I meant to mention earlier, it is purely a drafting matter but it seems to me that the word "such" in the fifth line of section 501(a) is surplus, and perhaps the committee or the committee's staff would like to consider this. There is no antecedent for the "such" in the sentence, and it looks to me as if it had been carried over from some earlier period, perhaps.

At any rate, the committee might like to think about that in its drafting work.

Mr. COFFEY. I have no further questions. Thank you.

Mr. FLOWERS. I will agree with the gentleman about the word "such."

The gentleman from California has come in and I will recognize him.

Mr. DANIELSON. I will defer my questions for the time being. I was unavoidably delayed and I would like to review the written statement.

Mr. FLOWERS. The last time the gentleman was not here we adopted his amendment in absentia.

Mr. DANIELSON. It proves that silence is golden.

Mr. FLOWERS. Mr. Fish, do you have any further questions or comments, or Mr. Mazzoli?

Mr. MAZZOLI. Mr. Chairman, I have sort of an extraneous comment. I would like to welcome my good friend, Art Schissel, who has some very strong connections to my district city of Louisville, who has worked with the Government and has been outstanding. His presence



today is an indication of that and I would like to extend my personal welcome to him and wish him lots of good luck.

Mr. FLOWERS. That is not extraneous.

Mr. MAZZOLI. Perhaps extraneous to national emergencies, but certainly to Louisville it is very important.

Mr. ARNOLD. Mr. Chairman, may I respond to that? We wanted Mr. Schissel to sit at the table with us. He modestly said he preferred to be in the audience. I am glad you recognized him.

Mr. FLOWERS. He is singled out. Next time we expect him to be sitting at the table.

[The prepared statement of Mr. Arnold follows:]

STATEMENT OF ELTING ARNOLD, SENIOR COUNSELOR TO THE GENERAL COUNSEL OF  
THE DEPARTMENT OF THE TREASURY

Mr. Chairman and Members of this Subcommittee:

It is a pleasure to be with you today to discuss the proposed "National Emergencies Act" (H.R. 3884).

As this Committee is aware, this legislation is the outcome of two years of study and hearings conducted by the Senate Special Committee on the Termination of the National Emergency. The Treasury, as well as other Executive agencies, has worked with the Special Committee in evaluating existing emergency powers and statutes. Among other matters, careful attention was given to the question of which statutes should be repealed as obsolete, which should be recast as permanent legislation, and which should be retained for use on an emergency basis.

The amended version of the Senate national emergencies bill, introduced in the last Congress, which passed the Senate on October 7, 1974, reflected the recommendations of the Executive agencies. The Director of the Office of Management and Budget wrote to the Chairman of this Committee on December 12, 1974 that the Senate measure, as amended, was acceptable to the Administration with the exception of one point which has been met in H.R. 3884.

With this change, H.R. 3884 is substantially identical to the Senate-passed bill on which OMB submitted its report in December. The Treasury Department considers that this legislation represents a workable approach to the national emergencies question. Perhaps it may be helpful to highlight features of this bill which the Treasury regards as especially important.

First, the bill provides a full year in which the Executive branch and Congress can make the adjustments which may be necessary or desirable in relation to the termination of emergency powers provided for in section 101 of the bill. Given the nature of the legislative process and the number of statutes and programs that may require consideration, this appears to be entirely reasonable time for the purpose.

Second, the Treasury strongly believes that the exemption of section 5(b) of the Trading with the Enemy Act from the bill's provisions terminating emergency powers is highly desirable. This exemption is essential to the continued effectiveness of the Foreign Assets Control Program administered by the Department. In addition, we believe that section 5(b) should be retained for emergency use to deal with international financial and investment problems that may arise in the future.

With respect to the Foreign Assets Control Program, termination of the emergency basis for use of section 5(b) would seriously affect the negotiating position of the United States with regard to controls which regulate transactions with several foreign countries and their nationals. Among other things, these controls freeze significant amounts of Chinese and Cuban assets to be held for an eventual settlement of the claims of United States citizens whose property in Communist China and Cuba has been seized without compensation. In this regard, it also appears that constitutional problems might arise with respect to the validity for continued blocking of assets of foreign countries if all national emergencies or authorities thereunder were terminated.

Finally, the provision of the bill providing for termination of future national emergencies by concurrent resolution is, in our judgment, preferable to the original proposals to terminate emergencies at a date certain. We feel that section

202 of the bill provides for adequate Congressional control over the period for which future emergency declarations may remain operative, without unnecessary inflexibility.

In sum, the Treasury believes that H.R. 3884 strikes a reasonable balance between the need to resolve questions with respect to emergency powers and the need to preserve flexibility for dealing with crises that may occur in the future.

MR. FLOWERS. Mr. Fish.

MR. FISH. I do not have any questions, Mr. Chairman.

MR. FLOWERS. Thank you, gentlemen. I do not see any sense in belaboring it. If we have reached an accommodation, if we understand each other, I will declare that this meeting be adjourned and we will recess until further call of the Chair, which will probably be next Wednesday, gentlemen, and we will hear from Defense.

I would suggest in light of the brevity we find here we might try to conclude that aspect. Thank you.

[Whereupon, at 2:10 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

# NATIONAL EMERGENCIES ACT

WEDNESDAY, MARCH 19, 1975

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ADMINISTRATIVE LAW  
AND GOVERNMENTAL RELATIONS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:09 a.m., in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Danielson, Jordan, Mazzoli, Patison, and Moorhead.

Also present: William P. Shattuck, counsel; and Alan F. Coffey, Jr., associate counsel.

Mr. FLOWERS. Gentlemen, if we could, we will get started and see if we cannot conclude at an early hour. We have three Democratic members here, but we are short on Republican members, even when they are all here, so we will go forward.

We want to continue our hearings on H.R. 3884, providing for termination of national emergencies and providing a procedure for future national emergencies. We are delighted to have testimony this morning from both the Department of Defense and the General Services Administration.

The first witness we have today will be from Defense, and we will ask him to come forward, Mr. Leonard Niederlehner, who is the Deputy General Counsel of the Department of Defense, and sir, if you have someone with you, the captain I just met or others, please introduce them and we will proceed.

After Defense, we will have testimony for GSA, and I will introduce them later.

## TESTIMONY OF LEONARD NIEDERLEHNER, DEPUTY GENERAL COUNSEL, DEPARTMENT OF DEFENSE, ACCOMPANIED BY CAPT. CHARLES WILLIAMS, U.S. NAVY AND WALTER FENERTY, OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

Mr. NIEDERLEHNER. Mr. Chairman, I have with me this morning Capt. Charles Williams of the Navy, who is quite familiar with the intricacies of military personnel law. Some of the items which we are interested in relate particularly to the Navy personnel structure. And this is his general field of interest within the Office of the Secretary of Defense. And to my left is Mr. Walter Fenerty of the Office of the Judge Advocate General of the Air Force, who has a longtime famili-

arity with the detailed background study of the emergency legislation upon which the pending bill is based.

I am very pleased to have the opportunity to offer comments to the Department of Defense on H.R. 3884, a bill to terminate certain authorities with respect to National Emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies.

The Department of Defense favors the goal of H.R. 3884 to terminate obsolete or unnecessary authorities based upon states of emergencies. However, a relatively small number of the authorities currently dependent upon a state of emergency affect contracting procedures, personnel entitlements, and organizational structure of the Department of Defense; and it is believed that the Congress will want to enact permanent legislation to treat with these various subject matters.

Legislative proposals have been made to the Congress dealing with most of these items and it is hoped that they will receive attention in the near future. However, we recommend that they be exempted from the broad sweep of the pending bill until such time as the Congress has an opportunity to consider whether, and in what form, these authorities should be enacted into permanent law.

World and national conditions have changed since President Truman officially proclaimed the state of national emergency in 1950 incident to the commencement of hostilities in Korea. Many authorities which were used then for the first time were regarded as extraordinary.

Since then, experience has demonstrated a need for these authorities in the regular conduct of day-to-day operations of the Department of Defense. The desirability of terminating existing states of emergency is recognized and no objection to their termination is entertained by the Department of Defense.

However, there are certain continuing needs which are accommodated by the existing national emergency proclaimed by President Truman in 1950 but which are not specifically provided for in H.R. 3884. The bill should provide an exception for each of the items I shall now refer to until such time as the Congress is able to consider permanent legislation to meet the particular need.

#### CONTRACTING AUTHORITY

(a) Since 1941, there has been available to the Department of Defense authority to deal with unusual contract circumstances. Termination of the national emergency would terminate such authority of the Department of Defense (and certain other agencies) under Public Law 85-804, codified at 50 U.S.C. 1431-1435, which is the current form of the 1941 statute.

This statute provides authority to correct mistakes in contracts, to formalize informal commitments, to indemnify contractors against losses or claims resulting from unusually hazardous risks to which they might be exposed during the performance of a contract and for which insurance, even if available, would be prohibitively expensive, and to grant other extraordinary contractual relief.

The Commission on Government Procurement, established by Public Law 91-129, recommended to the Congress in 1972 that the authorizations of Public Law 85-804 be made available generally

rather than being dependent upon the existence of a state of war or national emergency.

(b) The procurement process within the armed services is utilized to accomplish certain major social and economic policies by the placement of contracts in labor surplus areas and in disaster areas, by letting contracts to favor small business, and to achieve a balance of payments favorable to the United States. These collateral policies are achieved through the emergency exception to the requirement for formal advertisement under the Armed Forces Procurement Act (10 U.S. C. 2304(a)(1)).

The use of this emergency exception is limited by the Armed Services Procurement Regulations, codified at 32 CFR 3-201, to the achievement of the enumerated policies. In the light of the importance attached to these social and economic purposes, Congress should have the opportunity to consider the establishment of appropriate contracting procedures on a permanent basis.

#### PERSONNEL ADMINISTRATION

A number of personnel procedures which have become basic to the current military structure are based upon a state of emergency. Major legislative proposals which place many of these personnel procedures on a permanent basis have been proposed but have not been enacted.

They have been considered, however. The latest and most comprehensive of these proposals, the Defense Officer Personnel Management Act, was introduced in January 1974, but was not acted upon. Hearings were held. It will be resubmitted to the New Congress in 1975 and, if passed by the Congress, will cure most of the problems I shall now mention. These problems can be classified under two categories—those that deal with Defense organization and those that deal with personnel entitlements.

Under the heading of Defense Organization, the first item is retention of the emergency authority of 10 U.S.C. 3444 and 8444 which are required for the following purposes:

(a) To provide the authority to make temporary appointments of officers in the Chaplain, Judge Advocate, and Medical fields, who, because of constructive service credit in their specialties, are considered for permanent promotion earlier than line officer counterparts, and whose separation for failure of promotion might become mandatory under conditions inconsistent with the needs of the service.

(b) To provide the authority of the President as Commander in Chief to grant temporary appointments to exceptional officers of the Army or Air Force. An example is the promotion of the Air Force astronauts.

(c) To provide the authority to appoint alien doctors as officers in the Army and Air Force to meet critical shortages of military medical personnel.

(2) Over a period of years, the personnel structure of the naval service has developed around several emergency authorities which now form the basis of officer management. These authorities include:

(a) Section 5231(c) of title 10, United States Code, which suspends existing limitations on the number of admirals and vice admirals in

the Navy. If this authority is not continued, the Navy will lose approximately one-half of its three-and four-star admirals.

(b) Section 5232(b) of title 10, United States Code, suspends existing limitations on lieutenant generals of the Marine Corps. If this authority is not continued, the Marine Corps will lose five of the currently authorized seven lieutenant generals.

(c) Section 5711(b) of title 10, United States Code, authorizes the suspension of the statutory limit of 5 percent for early promotion selections specified in section 5707(c). This is the so-called selection below the zone.

(d) Section 5784(b) of title 10, United States Code, is needed to suspend time-in-grade requirements for promotion to all Navy and Marine Corps grades except lieutenant and lieutenant commander. This statute is also the authority for suspension of the mandatory promotion selection rate provisions for certain staff corps officers to grades below rear admiral.

(e) Section 5787, of title 10, United States Code, provides for temporary promotions in the Navy. Failure to retain this authority would require approximately 650 limited duty officers in the grade of lieutenant commander to revert to the grade of lieutenant. Discontinuance of this authority would also require Senate confirmation of all regular promotions to lieutenant (junior grade).

I would like to add a thought to the prepared statement at this particular point, Mr. Chairman. The five preceding items I have mentioned are peculiar to the Navy and Marine Corps. While the Navy is relying upon a limited number of emergency authorities for certain portions of the current officer management program, the authority for the Army and the Air Force in these areas is not based upon the existence of an emergency. This type of difference between the laws relating to the military departments is addressed by the Department of Defense in its proposals to the Congress for comprehensive legislation relating to the officers personnel management.

Pending the enactment of such legislation, the repeal of the emergency authority would create an unfortunate disparity in the management of officers personnel within the Department of Defense.

#### PERSONNEL ENTITLEMENTS

(1) There are currently 913 members of the Armed Forces who are listed as missing in action in Southeast Asia. Only the emergency authority of sections 3313, 6386(c), and 8313 of title 10, United States Code, authorizes the suspension of mandatory separation and retirements which would otherwise be applicable to allow some of these members to remain in the Armed Forces until they return or are accounted for. Whether or not their situation is viewed as warranting continuation of a national emergency, it would be inequitable to force their separation or retirement while they are in a missing status.

(2) Termination of the 1950 national emergency would also terminate entitlement to disability retirement or separation benefits under sections 1201 and 1203, of title 10, United States Code, for members with less than 8 years of service whose disability of 30 percent or more, although incurred in line of duty while on active duty, was not the proximate result of the performance of the active duty. Loss of this

eligibility—which would affect only junior officers and enlisted men—is particularly untimely when the Armed Forces are endeavoring to meet their manpower needs through voluntary means.

The Department recommends the deletion from the bill of subsection 602(a) (2), which refers to "Section 673 of title 10, United States Code"; this statute provides authority to order to active duty members of the Ready Reserve "In time of national emergency declared by the President after January 1, 1953." This statute would not be affected by termination of the existing national emergency.

In view of the need for continuation of the authorities I have referred to, the Department of Defense recommends that any legislation terminating emergency powers except the cited statutes from its effect until such time as the Congress has the opportunity to consider the necessity for permanent legislation.

Finally, there is one procedural requirement of H.R. 3884 which does not appear to us to be realistic. I refer to the provision in subsection 501(c) which requires a report to Congress on total expenditures within 30 days after the end of each quarter during a national emergency period.

The 30-day reporting requirement does not provide sufficient time to collect the required data for transmittal to Congress. Ninety days, we believe, would be more appropriate to accomplish the task properly.

This concludes, Mr. Chairman, the prepared statement. My colleagues and I will attempt to answer any questions which you may have.

Mr. FLOWERS. Thank you, sir. I do not know whether to say that I am glad to see that there is some controversy, which gives us a little bit more to talk about, or I am disturbed that this has not been brought to either the Senate committee or to us before this time. I was not aware that there were, as you say, these important emergency powers that were not already in this legislation.

Extending the exemptions to perhaps the extent DOD is asking and if other agencies have some similar problems with the legislation, I fear that what we are going to end up with is a piece of legislative work here that really does not terminate anything. It does not really do anything but give us a cosmetic solution to what some of us have thought was a correction of the record that was called for.

Now, basically, what you are talking about here is what, two different areas, one the contracting authority and the other is really personnel administration, and is that about it?

Mr. NIEDERLEHNER. That is correct. Yes, sir.

Mr. FLOWERS. In two different areas. Well, under the contracting authority, the first matter that you are talking about here, the legislation that we would be terminating has been on the books since 1941, is that right?

Mr. NIEDERLEHNER. Some of it goes very, very far back, yes, sir.

Mr. FLOWERS. Was this brought to the attention of the special Senate subcommittee? Are you aware of that when they reported the bill in the last Congress?

Mr. NIEDERLEHNER. Yes, Mr. Chairman. Let me give you just a brief background statement.

For the House Committee, we filed a report on December 24, 1974, after clearance with the Office of Management and Budget, and we

are in the process of presenting an additional report on the pending bill, which is identical to the previous one, S. 3957 of the 93d Congress. My personal familiarity with this problem dates from August of 1974.

Now, the entire decontrol process has been going on, I suppose, since about 1948. There were two decontrol acts, which were managed by Senator Wiley in 1948 and 1949, and these resulted in the removal from the books of a great number of emergency and wartime authorities.

The current study under Senate Resolution No. 9 was apparently initiated in January of 1973. Now, the problem which we encountered was this: the work of the Special Subcommittee was a study and it was not until sometime in 1974, I think August 22, 1974, that any form of a bill was introduced.

We were not requested to comment upon it and there were no hearings held in the Senate.

We prepared a report immediately upon the introduction of the bill and as I say, there was not time to present it to the Senate. We did provide it to the House Judiciary Committee under date of December 24, 1974. At the time of the introduction, there was an outstanding letter to the Senate committee, which was filed by the Air Force, which was in the nature of a study showing the items which were affected by the bill, and the items which were considered to be of importance to the Department of Defense at that particular time.

The outline, which was provided to the committee, covered pretty close to 400 items and of those we indicated an interest in approximately 60 items. The Air Force at that time had the responsibility for the bill, but they were not in a position to act as referee for the other two Services, and they brought it to the attention of the Office of the Secretary of Defense.

At that point, we had previously reduced the 400 to 60, and in August and September, we reduced the 60 down to 10, which are the 10 which presently are covered in my statement and in the letter previously filed with the committee. And we are pretty well convinced that this is a fairly basic minimum as far as items which are of great concern to us.

Mr. FLOWERS. Well, I certainly cannot quarrel with the underlying thesis on page 4, as you talk about the procurement process, for instance, utilized to accomplish certain major social and economic policies such as the placement of contracts in labor surplus areas, and in disaster areas, by letting contracts to favor small business and to achieve a balance of payments favorable to the United States. I do not quarrel with that, if that is what the emergency power gives you the opportunity to do.

What is difficult to understand is why that has not been dealt with in basic legislation, I guess through the Armed Services Committee or whoever would be involved there. And I would fear that if we do not have some sort of push in some way, that we are going to continue to need the emergency legislation rather than to deal with this on its own merits.

And what would you say to that, sir?

Mr. NIEDERLEHNER. Well, the report which was made by the Commission on Government Procurement was filed in 1972. Now, nothing I think would be done with respect to this particular item unless some



reaction is received from the new Office of Federal Procurement Policy, which is now headed by Mr. Witt in the Executive Office of the President.

The report in 1972 was made to the Congress, but no recommendation has as yet come from the new Commission. And I would anticipate that they will be addressing themselves to that recommendation as well as to the other recommendations of that Commission study.

Mr. FLOWERS. Well, I wonder, really, if the pressure is taken off, which is apparently presented by the prospect of this legislation, whether we will have any early action on it. And in the field of personnel administration, generally the same comments I think on my part would apply. I do not find fault with what you say here, except that it is the kind of thing that ought to be dealt with on its own merits in substantive legislation, that it ought not be under the guise of emergency powers, I think, that reside in the executive branch.

And I would just address the same question, should this exemption be extended to include the things you have asked for here, what prospects would we have that that would get any early attention on a permanent basis, that that would allow for a deletion from the emergency powers at a later date?

Mr. NIEDERLEHNER. Well, as far as the executive branch is concerned, Mr. Chairman, we have proposed solutions to these various problems, and particularly in the area of military personnel management. The subject matter is extremely complicated and the House committee last year on the 1974 submission commenced hearings on the comprehensive Defense Officer Personnel Management Act, but decided that it was a little bit too complicated to complete the action.

And unfortunately, as sometimes happens, they passed several fractions of the statute as individual enactments, and this is somewhat the problem that you have. Ironically, many of the problems we are dealing with are either so complex as to take a great amount of time to deal with or somewhat minimal and not deserving of urgent attention.

I would say some of the pay items would be in this category.

I would say very briefly that we would hope to get attention by the Armed Services Committees to all of these items which we have mentioned. The procurement items, I think, would probably come to the Government Operations Committee through the Federal Procurement Commission, but as far as our personnel items are concerned, we certainly would hope that attention will be given to them.

Now, I do not want to imply any criticism of the committees because, as I say, the items are quite complex and difficult to deal with.

Mr. FLOWERS. Well, I would agree with that, but I think that we have a role and a responsibility in these days to try to uncomplicate government and try to uncomplicate the United States Code and our statutes. And hopefully, we can work in that direction.

I am going to call time on myself and recognize the gentleman from California, the distinguished ranking minority member for whatever he might have to address to you, sir.

Mr. MOORHEAD. Thank you.

I am very much interested in your comments on the Ready Reserve and the recommendation that it be deleted from the list of exempted statutes. I know from talking to most people in the Reserves, one of the big complaints has been that the Reserves were not called during

the Vietnam war. They felt that they had a function and that function was not used. If we followed your recommendations here, and took away the power to call up the Ready Reserve, would that not further cutback on their efficiency, and their drive to be ready and effective?

Mr. NIEDERLEHNER. No sir. The point is that that section remains on the books. It could have been used during the Vietnamese war by the declaration of an emergency. It can be used in any future situation by the declaration of an emergency. There is no existing emergency in effect which would permit the use of that particular section, because it provides in its own context that it is only available upon the declaration of a new emergency after 1953, so that that authority is available to us and will remain available.

Mr. MOORHEAD. Might there not be times when the Ready Reserve should be called up or would be necessary perhaps for foreign policy reasons, even though we technically are not in a state of a national emergency or at war?

Mr. NIEDERLEHNER. Well, I am not sure I understand your question, but let me try this. In order to effectuate that statute with the authority to call up to a million Reserves, there must be a new declaration of emergency by the President, and the President has not seen fit to do that, or did not in the Vietnamese war.

There was a good deal of discussion of this at the time, and I think that Secretary McNamara said that he felt that the Reserves must be kept in reserve, and they relied upon the Regular forces and upon the Selective Service. And I know that there is a great deal of attention given to the fact that the Reserves were not utilized.

Mr. MOORHEAD. In your discussion of this Defense Officer Personnel Management Act, you indicated that legislation is very important to you and would solve an awful lot of your emergency related personnel administration problems.

Can you tell me specifically which areas that legislation would affect.

Mr. NIEDERLEHNER. Now, Mr. Congressman, I would like to defer to my expert, Captain Williams.

Captain WILLIAMS. Mr. Congressman, if I could refer to Mr. Niederlehner's statement commencing on page 5, I might be able to indicate those problems that he had reference to that we feel will be cured or substantially alleviated by the enactment of our proposed legislation of a more comprehensive nature.

Starting initially with sections 3444 and 8444, which pertain to the Army and the Air Force, the problem presented here is one of a technical nature that forces out certain categories of officers who have failed in selection for promotion before they are eligible for retirement. The Defense Officer Personnel Management Act, which would standardize these kinds of provisions for all of the military departments, would preclude this kind of thing from happening and we feel that it will be a cure for this particular problem. The continuation of the emergency authorities would be a temporary expedient until the Defense Officer Personnel Management Act can be considered and acted on by the Congress.

Mr. MOORHEAD. You would have a serious problem, then, if H.R. 3884 would pass prior to the time.

Captain WILLIAMS. Well, the numbers of persons involved are not large, Congressman. I think about 38 officers in the Army and some 20 officers in the Air Force would be affected.

The Defense Officer Personnel Management Act does not specifically address the exceptional promotional authority which is being used by the Air Force to promote astronauts. Perhaps some other cure for that could be sought.

The Defense Officer Personnel Management Act does address the appointment authority of officers and standardizes that for all services.

On the next page of the statement, there are two sections that deal with admirals in the Navy and generals in the Marine Corps. The current emergency authority permits the Secretaries of those two services to nominate officers of four-star and three-star grade, if I could use that terminology, in excess of what the permanent law limitations are. Of course, these nominations are to positions of great importance and responsibility, which is a term used in the law itself. They are approved by the President and confirmed by the Senate, so it is not a *carte blanche* authority that the services have in this area. There are restraints, and each position is carefully considered. However, the permanent law is much more restrictive in the case of the Navy and the Marine Corps in this particular area than is the permanent law of the Army and the Air Force. I cannot speak for the complete justification of all of the three- and four-star admirals and generals in the Marine Corps and Navy, but I can say that the withdrawal of this emergency authority would have tremendous repercussions as far as the organizational makeup of those two services is concerned, and would require the elimination of about half or more of our most senior military leaders.

Mr. MOORHEAD. One thing that greatly concerned me in your statement was that unless some exemption was put into the statute, you might very well have to discharge the people who are missing in action. Is that correct?

Captain WILLIAMS. Yes, sir. That is further on in the statement. The Defense Officer Personnel Management Act did not anticipate that kind of a situation, so there is not a specific statute proposed in the legislation to correct that. However, there is a provision that we think could be used to protect these individuals that would defer involuntary separation or retirement until a medical determination had been made as to their status.

Mr. MOORHEAD. So you can live without those emergency powers?

Captain WILLIAMS. Not until we would have the Defense Officer Personnel Management Act enacted.

Mr. FLOWERS. Would the gentleman yield?

Mr. MOORHEAD. Yes.

Mr. FLOWERS. I was curious in reading that part of the statement too, Captain, and the obvious question to me is how did we get by this similar situation after World War II? We made do somehow or another because there were an enormous number of missing personnel then that were not determined to be either killed in action or whatever. What did we do then?

Captain WILLIAMS. Mr. Chairman, there have been many changes in the law over the years. To just after World War II we had the largest revision to the officer personnel laws that we have ever had

in 1947, which took into account these factors. There were transition provisions and terminable provisions put into the Officer Personnel Act of 1947 that would have covered those people.

Mr. FLOWERS. Thank you.

Mr. MOORHEAD. What would you think, or what would the Department of Defense think if we would put a limitation on these exemptions for 1 or 2 years' time?

Captain WILLIAMS. Could I defer to Mr. Niederlehner?

Mr. NIEDERLEHNER. Mr. Congressman, the more time that we are permitted, of course, the better it is from our point of view because of the greater likelihood of having the permanent legislation enacted. But, I would like to point out that, if you placed a limitation, let us say, of 2 years for the existence of certain authority during which time it was expected that the Department of Defense would accomplish certain goals and ends, we would consider that to be quite reasonable and quite fair, because then we could of our own initiative accomplish those goals and those ends. But what we are dealing with here is the deferral of the removal of certain authorities until Congress takes a look to determine whether we should have permanent authority to substitute for the emergency authority. So we are really in a situation where whatever you do in this bill is setting a time limit with respect to the action of the Congress. And I am saying, whether or not the Congress determines that we should be given any of those authorities in a permanent form, we certainly think that it should have an opportunity to look at them and to consider the consequences. I think this is particularly true where there are disparities between the treatment of officer personnel, for example, in the Navy as compared to the Army and the Air Force.

To answer your question very briefly, we would hope to get permanent authority in each of those areas, that is, have it either enacted or denied within a relatively short period of time. But it is not a matter that is within our control. That is the reason that we have asked for a general exception. On the other hand, if Congress provides an exception in the bill itself, pending further action by the Congress, it is a matter which is uniquely within its own ken, so that these exemptions can be removed at any time and certainly would be removed in the event of a permanent enactment in one of these fields or in the event that some decision is made not to enact permanent legislation dealing with the situation.

Mr. MOORHEAD. It would certainly make it easier for everyone concerned if there was permanent legislation and you did not have to depend upon emergency statutes, even though they have been utilized for many years.

Mr. NIEDERLEHNER. Yes, sir, it would.

Mr. MOORHEAD. Thank you very much. And we appreciate your coming here this morning and helping us.

Mr. NIEDERLEHNER. Thank you, sir.

Mr. FLOWERS. The Chair recognizes the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Mr. Niederlehner, I note from your statement on page 2 that the contract authority to which you refer has been in effect since 1941,

which as I recall it, was about the time that we were getting deeply involved in World War II. But anyway, it is 34 years ago.

As to personnel administration commentary on page 4, you state here a number of personnel procedures which have become basic to the current military structure are based upon the state of emergency. Now, this gives me some concern because I do not think that we are performing our duty where we permit or encourage basic changes in our Government organization to be based upon emergency legislation. When did this personnel emergency legislation become enacted, when was it enacted?

Captain WILLIAMS. If I could respond to that?

Mr. DANIELSON. Surely, Captain.

Captain WILLIAMS. There are, of course, a number of statutes codified in title 10.

Mr. DANIELSON. Right.

Captain WILLIAMS. Which have grown up over the years, so to pin down at any point in time—

Mr. DANIELSON. Let me take this seriatim now. You talk about a state of emergency, and now the first one you deal with on page 5 in paragraph A, subnumber 1, you talk about 10 U.S.C. 3444 and 8444. When were they enacted?

Captain WILLIAMS. Well, as I recall those two sections stem from the Officer Personnel Act of 1947.

Mr. DANIELSON. Counsel has just shown me a citation out of the United States Code. It is August 7, 1947. OK.

Now, let us move to the next one. The next one you cite is on page 6 in paragraph 2, subsection a, 10 U.S.C. 5231(c). You are referring to admirals and vice admirals. When was that enacted?

Captain WILLIAMS. I believe that also stems from the Officer Personnel Act of 1947.

Mr. DANIELSON. 1947. Well now, is that an emergency act too?

Captain WILLIAMS. Well, within the text of that particular section, there is an enabling clause that would exclude certain provisions of it during an emergency or a war.

Mr. DANIELSON. Oh, so the basic law here in title 10 included a provision which perpetuated the authority previously granted under emergency legislation?

Captain WILLIAMS. I cannot speak for whether it was ever previously granted or not.

Mr. Niederlehner, I note from your statement on page 2 that the Captain WILLIAMS. And subsection c I believe.

Mr. DANIELSON. Subsection c, "Except in time of war or in actual emergency." So, therefore, the exception hinges upon there being a time of war or a national emergency in effect?

Captain WILLIAMS. Yes, sir.

Mr. DANIELSON. All right, that is the 1947 act. But what is the emergency then that triggers this exception? Is it the World War II emergency of 1941?

Captain WILLIAMS. No, sir. The Korean emergency of 1950 in this case.

Mr. DANIELSON. So this hinges on the 1950 Korean emergency?

Captain WILLIAMS. Yes, sir.

Mr. DANIELSON. OK. So that has been in effect for 25 years. Is that likewise the controlling statutory authority for subsection b on page 5, the temporary appointments to exceptional officers? It is near the bottom of page 5 of Mr. Niederlehner's statement, five lines from the bottom of the page.

Captain WILLIAMS. That stems from the Officer Personnel Act of 1947 also.

Mr. DANIELSON. Which in turn provided that the exception is triggered by the Korean emergency declaration of 1950 then?

Captain WILLIAMS. I believe so.

Mr. DANIELSON. A promotion for Air Force astronauts. We did not have any astronauts in 1950 as I recall.

Captain WILLIAMS. That is the current utilization of that particular provision.

Mr. DANIELSON. All right. The astronauts came into being in approximately 1959 or 1960, the first three were selected for training I believe.

Captain WILLIAMS. I believe there are approximately seven that would be covered by the statute right now.

Mr. DANIELSON. Seven, and of course we have had a number added since that time. I mean the original astronauts have been replaced by a new generation.

Captain WILLIAMS. Yes, sir.

Mr. DANIELSON. All right now, then providing for the authority to appoint alien doctors in subparagraph c, is that also based upon the act of 1947, triggered by the Korean emergency of 1950?

Captain WILLIAMS. Yes, sir. Those appointments will be made under this same general provision of the law.

Mr. DANIELSON. I am just trying to date these things because our concern here is that we have been allowing emergencies to continue too long, and I am just trying to find out what is the vintage year of some of these.

Now, on page 6 you mention that over a period of years, and this is Mr. Niederlehner's statement, the personnel structure of the naval services has developed around several emergency authorities which now form the basis of officer management. Now then, you have got title 10, subsection 5231(c) on the number of admirals and vice admirals. Is that again the 1947 act plus the 1950 Korean emergency?

Captain WILLIAMS. Yes, sir.

Mr. DANIELSON. Would that be generally the pattern on these subsections? I do not mind going through them. Well, let's go through them. Section 5232(b), the next subparagraph, lieutenant generals in the Marine Corps. Is that again 1947 and 1950?

Captain WILLIAMS. Yes, sir, that same situation.

Mr. DANIELSON. The next one, 5711(b), the suspension of the statutory limit of 5 percent for early promotion, is that again 1947 plus the 1950 emergency?

Captain WILLIAMS. If I might have a moment to confirm this. Yes, sir.

Mr. DANIELSON. Then 5785(b) to suspend time-in-grade requirements for promotion to all Navy and Marine Corps grades except lieutenant and lieutenant commander. Would that likewise be the 1947 act plus the 1950 emergency?

Captain WILLIAMS. Yes, sir.

Mr. DANIELSON. We are almost done with them here. On page 7, title 10, section 5787, temporary promotions in the Navy, and you say failure to retain this authority would require approximately 650 limited duty officers in the grade of lieutenant commander to revert to the grade of lieutenant. Would that be the 1947 act plus the 1950 emergency?

Captain WILLIAMS. No, sir. In this case there is a prior law that was recodified and picked up with the Officer Personnel Act of 1947.

Mr. DANIELSON. In other words, it is in the 1947 act, but it has its roots in earlier legislation?

Captain WILLIAMS. Yes, sir.

Mr. DANIELSON. But there is also a triggering by an emergency or a state of war?

Captain WILLIAMS. Yes, sir, and the Korean emergency would be the current triggering device.

Mr. DANIELSON. All right, sir. Now you mentioned limited duty officers. I was in the Navy but there were no limits to our duty at that particular time. What is a limited duty officer?

Captain WILLIAMS. I can best describe a limited duty officer by describing him as a specialist in a particular career field.

Mr. DANIELSON. I see.

Captain WILLIAMS. In a particular special career field.

Mr. DANIELSON. Like the judge advocate or the Supply Corps?

Captain WILLIAMS. Supply Corps would be a good example.

Mr. DANIELSON. I understand. Thank you.

Now, here is my concern. We have contract authority since 1941 based on emergency, and I fully respect the fact that it is easier to operate under that emergency provision than under the basic law, because it gives you greater flexibility. But my concern, and I think that of many of my constituents, is that the emergency has gone too long, 34 years. There are people who are grandparents, who were not yet born at that time, and I feel that our duty here is to go ahead with the type of legislation we have. I do not wish to participate in bringing any unnecessary, undue burdens on the people in your Department who have this responsibility. But, is there any good reason why, if the emergency is brought to a close, the appropriate committee of the Congress under your instigation could not pass permanent legislation meeting the needs of today? Why do we kid ourselves by acting on a World War II emergency that no longer exists when we could pass substantive legislation to meet our current needs?

Mr. NIEDERLEHNER. Well, Mr. Congressman, I would say that we certainly would hope that at our instigation, as you say, we can get the Congress to pass permanent legislation in all of these fields. I quite agree that we are dangling on a shoestring relying upon emergency authorities.

Mr. DANIELSON. Well, I think that it is better to stand on a firm foundation than to dangle by a shoestring, and you know, the Constitution as I read it says that the Congress shall have the power to raise armies and navies, no one else. If with your instigation the appropriate committees would pass the kind of legislation you need to work under today, and I am sure that Congress would, then you can get rid of these mythical emergencies that do not exist. I think it is probably time for Congressional review. I cannot quite subscribe to



the statement which was voiced by one of you gentlemen that the subject matter is too complex. I just cannot quite believe that you people in your law offices can handle it but that we cannot in ours. I just cannot quite believe that.

I practiced law for a number of years. I find that I got my law out of the same books that you do. With people of good will, and diligence, energy, I am sure we can handle that. I feel that there is no need for concern that the Congress is not up to handling this problem.

The personnel matters show the trap we fall into. It illustrates how a groove can become a rut. A number of personnel procedures which have now become basic to current military structure are based upon emergencies. Perhaps it is time that the Congress reviewed this structure. Perhaps it is time that we passed substantive legislation which says that World War II is over, Korea is over, and I guess Southeast Asia is over. If not, it is certainly dwindling. Let us get back to or go forward to, a basic structure.

Now, I do not want to create any insurmountable problems. This bill as now drafted calls for an effective date being 1 year after the date of enactment. That is a full year. If in a few cases, Mr. Chairman, something might be critical here, difficult or complex, if we were maybe to say the provisions contained in sections a, b, c and so enumerated—the sticky ones you could say the termination would be effective at the close of the fiscal year 1977, June 30, 1977, and that is only 2 years off. Do you think you people could instigate the appropriate committees to hear your pleas for substantive legislation if we were to pass a bill of that nature?

Mr. NIEDERLEHNER. Well, Mr. Congressman, as I say, we would hope we would be able to get permanent legislation in all of these areas. But I think we are most hesitant to suggest that we are able to see to it that the Congress pays attention to these matters within 2 years.

Mr. DANTELSON. Well, in that event, you see, it is not your fault. You have passed the buck successfully to the body that the Congress charges with that responsibility. It is up to the Congress, it is not up to you. You are administrative officers to carry out the policies set by the Congress, and if the Congress fails, then we fall flat on our face, and you have nothing to do except say, "See, I told you."

I am going to pursue in this legislation, as we mark it up, pretty much the pattern that I have voiced. I understand your problems, believe me. I am sympathetic to them. I think you are probably just a little bit afraid to bite the bullet, and I think it would be exhilarating for you to get out from behind those musty old accounts and try to get some substantive legislation through. You might have a real thrill here, and I encourage people living dangerously.

Thanks so much for your help, and I think I will proceed pretty much like I have indicated.

Mr. NIEDERLEHNER. Thank you, sir.

Mr. FLOWERS. I recognize the gentlelady from Texas, Ms. Jordan.

Ms. JORDAN. Thank you, Mr. Chairman.

I would like to call your attention to page 3 of your testimony in which you conclude by saying, "the Commission on Government Procurement recommended to Congress that the authorizations," et cetera, "be made in permanent legislation rather than dependent on emergency." You submitted that recommendation to the Congress in 1972.



Would you tell me what action followed, where was it submitted and what action was taken? What did you do to help move that recommendation along?

Mr. NIEDERLEHNER. I would think that would go to the Government Operations Committee.

Ms. JORDAN. Did it go?

Mr. NIEDERLEHNER. I am not aware of that, no.

Mr. JORDAN. You did not followup, then, on this particular legislation?

Mr. NIEDERLEHNER. No, because this Commission report also established an Office of Federal Procurement, that is Government procurement, and the responsibility for contracting matters Government-wide as distinct from the various agencies from a policy point of view now will reside in that office which is in the Executive Office of the President.

Ms. JORDAN. All right, Mr. Niederlehner, now tell me, why is that provision in our bill, which is on page 2, and states that "such termination of emergency shall not affect," and then if you go to sub 3, "any rights or duties that matured, or penalties that were incurred." When you talk about missing-in-action persons in Southeast Asia, have not those rights matured and the duty of the Government matured? Is that not accepted under this sub 3 on page 2 of the bill?

Mr. NIEDERLEHNER. Well, I do not think we could consider that rights have matured because we really do not know the status of these individuals. Certainly if the individual officers had acquired rights prior to the effective time of the statute they could not be removed by the statute, but I do not know that we could find that the right not to be retired, for example, would have vested in someone whose existence we are simply not aware of at this moment.

Ms. JORDAN. All right, how does the emergency provisions that you refer to take care of missing in action? Where specifically is the language under which you discuss the rights of persons missing in action? Where is the language of this particular emergency legislation? Who are we talking about and how do you know that we are talking about anybody?

Captain WILLIAMS. Ms. Jordan, if I could respond to that, please?

Ms. JORDAN. Yes, sir.

Captain WILLIAMS. What the three sections of title 10 cited in the statement of Mr. Neiderlehner refer to are the mandatory separation or retirement provisions of the officer management law. Those sections in themselves, or sections related to them provide the authority to the President to suspend the operation of those laws in the event of emergency or war, and this is the authority that we are seeking to retain so that we can continue to suspend the automatic operation of the law which would force the involuntary separation or retirement of these officers.

Ms. JORDAN. Would you agree that this is an arguable point, that the bill may, as we have drafted it, and if it were to become law, that it may in effect except these persons who are missing in action, is that an arguable point?

Captain WILLIAMS. Ms. Jordan, not being a lawyer I would have to defer to someone who had looked at the legal aspects on that.

Ms. JORDAN. Well, Mr. Danielson, who is lawyer—

6 Captain WILLIAMS. We have not interpreted it that way in the personnel management area though.

Ms. JORDAN. Mr. Danielson who is a lawyer and myself feel that that would be a case. We would like to try if we had to do that. On a contingency fee, yes.

Mr. NIEDERLEHNER, do you need affirmative legislation in all of these areas that you have mentioned? Are they so essential to the day-to-day operation of your department, each one, that affirmative legislation is needed to cover this given circumstance?

Mr. NIEDERLEHNER. Well, as your question is phrased, yes, in order to accomplish each of these purposes or to preserve each of these rights we would have to have additional legislation in the event of the termination of the emergency.

Ms. JORDAN. And it is essential to your day-to-day operation that we preserve the right to appoint temporary chaplains?

Mr. NIEDERLEHNER. Assuming that we would want to appoint temporary chaplains I would say yes. Now, if you take any one of these and question whether the structure will survive without it, I guess I cannot, I cannot argue that we would not get by.

Ms. JORDAN. You would manage?

Mr. NIEDERLEHNER. I would dare to say that with respect to chaplains, but as far as generals of the Marine Corps I would like to be excused.

Ms. JORDAN. I have no further questions, Mr. Chairman.

Mr. FLOWERS. I recognize the gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Thank you very much, Mr. Chairman.

Gentlemen, we appreciate your help today and your suggestions about the bill. I do not wish to belabor any point, but it does occur to me that, with the emergencies having existed at least on the books for 30 or 40 years, there does come a time for them to have be expunged from the record. Then whatever can stand on its own merits, whether promoting alien doctors, or keeping people in the service who would otherwise be RIF'ed, or promoting astronauts out of order or what have you—if those things are important, and they are necessary for the fabric of conducting the Defense Establishment—then I think that the appropriate committee would support them. If they cannot, and in my personal view there are some that would not be able to pass muster today, then I think they will go down where they should have been down perhaps 10, 15 or 20 years ago. So this committee will be trying, it seems to me, to establish first that some emergencies ought not to be fictionally plastered across our statute books, and second, for those important aspects which have been triggered under existing emergencies, as we have seen them on the books, those would be rehabilitated and in a position to be rehabilitated so that the Defense Department can manage its very serious functions. And I think that the statements you have heard today would indicate where this committee is on this point. And we are trying to make that balancing, and I think that with the proper efforts on your part, we can accomplish the job.

Thank you very much, Mr. Chairman.

Mr. FLOWERS. Thank you, Mr. Pattison.

Mr. PATTISON. Thank you, Mr. Chairman.

Mr. Niederlehner, I think I understand the position of the Department of Defense, but it seems to me that the arguments we are hearing could just as easily have been constructed by the mind of a Lewis Carroll, or a Russell Baker, or perhaps a Jules Feiffer. It seems to me that emergency legislation is passed with an implied, in fact frequently explicit promise that after the emergency extraordinary measures will no longer be necessary, and we hear that every day in the Congress, almost every day, and in fact, almost all of the legislation we seem to enact is based upon some sort of an emergency. And the argument is always that this is just an emergency, it will be over very shortly, and as soon as these conditions change, then it will no longer be necessary to do this. And it seems to me that that promise is exactly what is expressed in the concern of this bill, that we are trying to live up to that promise because the other argument, whenever emergency legislation is proposed is that look, don't kid us, we know that the emergency legislation proposed today is going to continue on forever, and nobody is going to terminate the emergency. And I think that it is very difficult to make the argument that the emergency will terminate when these emergencies that have gone on for 34 years, obviously long after the actual emergency, have passed.

Now, I understand the necessity as a lawyer for the use of legal fictions, and they are very useful sometimes, but ultimately, usually even in the courts we ultimately recognize that a fiction is a fiction, and that we will just simply do the thing that we originally accomplished by use of the fiction to start with. It is kind of a belated type of action on our part. I think it is long gone by. But I think it is about time that we operate honestly and say that this emergency, these emergencies are in fact over, and that to the extent that things have developed in the emergency period were valid, then to that extent, that same extent, we should propose those to the Congress and enact them into permanent law. And it seems to me that your concerns as expressed to this committee are, we understand those concerns, at least I understand those concerns, but I do not—I think you are expressing those concerns to the wrong committee. This committee cannot enact legislation based upon all of these things that have developed during the emergency. And I think those things ought to be properly presented to the appropriate committees of the Congress to deal with those particular matters and let them stand or fall on their own merits. And I guess what I am asking from you, if there is a question implied at all, is that I would like to know what your comments on those statements are. That turns that into a question from being a speech.

Mr. NIEDERLEHNER. First of all I would say that when Mr. Danielson and I left the Navy at the end of World War II we would never have suggested even in jest that emergency statutes would be in effect in 1975.

Mr. DANIELSON. Mr. Niederlehner, I swear I thought you were on the battleship *Maine*.

Mr. NIEDERLEHNER. There is an old story that the Pentagon building when it was designed in 1942 was built with wide ramps because it was going to be used for a hospital, and the ramps were to accommodate moving vehicles. There are at the present time 32,000 people in it and they are disposing of a tremendously large budget. I think we have just never had the chance to catch our breath since 1941, and if you

will pardon the expression, get back to normalcy. There has just been turmoil in the world, and emergency has been the pattern of our existence.

Mr. PATTISON. You do not see any end to that?

Mr. NIEDERLEHNER. I went to lunch with an oldtimer a few weeks back who was a lawyer in private practice and he told me that he was utterly shocked to see me stay in the Department of Defense in 1948 because he thought that it was going to fold up within a few months, and I was not certain of that myself. But I have been there for a long time, and I think that it is just the turbulence that the world has found itself in that we have never gotten down. I could not agree with you more that the proper way to do this would be to take a look at the structure and to deal with it with permanent legislation and get it settled that way. And we certainly hope that that will occur.

Mr. PATTISON. I have no further questions.

Mr. FLOWERS. Thank you, I would in closing, as far as I am concerned, request that if after this discussion this morning and your review of the statement you feel that it would be in order, and I hope you will, to furnish us with some specifics as to the numbers of personnel that are involved, perhaps what they are doing. You say five out of seven admirals at one point, and the kinds of jobs that are involved in this thing that make it important I think would have some bearing on our determination. And I would hope that you could give us some rather specifics on that. I do not care about the name, rank and serial number or anything like that, but more of a specific line item than we have got here.

And before closing, I am going to give counsel a short opportunity here. Do you have anything, Mr. Shattuck?

Mr. SHATTUCK. Yes, Mr. Chairman, I would like to inquire of the witness concerning one of the provisions of the repealer section of the bill; that is, section 601, subsection (b) there provides for a deletion of the paragraph requiring that leases of nonexcess property have a provision making the lease revokable in times of emergency. Just what is this provision?

Mr. NIEDERLEHNER. This, Mr. Shattuck, is the so-called leasing statute which was passed. I think, about 1948. I think the question at that time was the validity of recapture provisions, and the statute was phrased in terms of requiring recapture clauses. I think the repeal of the requirement for a recapture clause would not prevent the Government from inserting recapture provisions.

Now, there was litigation involving this statute in California where there was a prohibition against restraints on alienation, and the Federal court to which the litigation was removed came to the conclusion that there was a superiority if you will, or a constitutional ascendancy of the Federal provisions over the State prohibition, and the recapture provisions were held to be valid. But we do not feel that if there is removed the requirement that we insert a recapture clause that this will prevent us from approaching the matter from a contractual point of view.

Mr. SHATTUCK. So you still have the right to include it in a lease should you so desire?

Mr. NIEDERLEHNER. That is what we would consider, yes, sir.

Mr. SHATTUCK. In subsection (g) of section 601, the same section, there is reference to merchant ships. Is there any Defense interest in

that provision? This has to do with a rather old law concerning sale of merchant ships.

Mr. NIEDERLEHNER. I believe that is a matter of concern to the Commerce Department rather than to us. This is section (g)?

Mr. SHATTUCK. Apparently if it has any reference at this point in time, it must be to old ships, because it goes all the way back to 1946.

You have indicated in your statement, Mr. Niederlehner, that Defense has no objection to the deletion of the provisions in subparagraph (2) of section 602(a), that is, the provision relating to the Ready Reserve. I take it that Defense did not recommend the inclusion of that provision in the bill?

Mr. NIEDERLEHNER. I just do not know how that got in, Mr. Shattuck. There were some discussions between the Senate committee staff and the representatives of the Office of Management and Budget, and Mr. Hoffman had some discussions with Senator Mathias just prior to the introduction of the bill. He happens to be out of town at the moment, and who suggested section 673 I just do not know.

Mr. SHATTUCK. Well, did not the Senate study start out as the study of all emergency statutes, and at one stage of their consideration were they talking about repealing emergency statutes?

Mr. NIEDERLEHNER. Well, as I understand it, this was the posture of the study, and one of the reports which we filed with the committee related not to termination of emergencies, but to concurrence in the repeal of a large number of statutes which related to real property. There were a substantial number of those, and we reported to the committee that there was no objection to the repeal of these, so that right up to the time that the bill was introduced it was not clear that we were dealing in the bill in this particular form with the termination of emergencies, but rather it was repeal of statutes. We had two reports in August of 1974, a separate one dealing with real estate, and then in August 1974 the report which dealt with the totality of the emergency statutes, and it was from this group that we had indicated an interest in retention of 60 out of the 400. And as I say, we later pruned the 60 down to 10.

Mr. SHATTUCK. Well then, is it possible this was a provision that was intended to be retained as an emergency statute, quite a different thing than retaining its operational force?

Mr. NIEDERLEHNER. It is quite possible that that could have happened because we would have strongly recommended against the repeal of this. As I say, until the Senate bill actually was introduced, we were treating this as a matter of repeal rather than termination of emergency. Both of our reports, which I could furnish you if you would like, dealt with either the repeal or the retention of emergency statutes.

Mr. SHATTUCK. Yes; thank you very much.

Mr. FLOWERS. Mr. Coffey, do you have anything to direct to these gentlemen?

Mr. COFFEY. Just one question, Mr. Chairman. Thank you. And it is in followup to a question asked earlier by Congressman Moorhead, and it was begun to be answered, but I do not think it was really completed. He asked about the DOPMA legislation, the Defense Officer Personnel Management Act and asked for an indication as to which items in your personnel administration list would be covered by this bill if passed. You began to answer it and I would just like to get it on

the record of we could. I think you began your answer on page 5 of your testimony. Did we cover everything there?

Captain WILLIAMS. Yes, sir, if I could, I think we could pick it up on page 6. That is where I think we were terminated.

Mr. COFFEY. Fine.

Captain WILLIAMS. At that time I believe I was addressing the two sections of title 10 that addressed the limitations of admirals and generals, section 5231(c) and 5232(b).

Mr. COFFEY. Would that be covered by—

Captain WILLIAMS. No. I wanted to make sure that it was understood that the Defense Officer Personnel Management Act as it is now written does not address the grades above colonel in the Army and Air Force or captain in the Navy. It was deliberately terminated at that grade.

Mr. COFFEY. So this is a problem that would have to be handled by other legislation?

Captain WILLIAMS. It would have to have separate legislation of a follow-on nature.

Mr. COFFEY. How about the next item?

Captain WILLIAMS. That would be covered.

Mr. COFFEY. That is the 5-percent limit for early promotion?

Captain WILLIAMS. Yes. What the proposed legislation would do is to standardize this kind of thing across all of the four Services, and it would change the limitation to 15 percent instead of 5.

Mr. COFFEY. All right. How about the next one on the list? The suspension of time-in-grade requirements for promotion?

Captain WILLIAMS. Yes. That would be covered in the proposed legislation, as well as the first item on page 7 which addresses the emergency promotion authority of the Navy under section 5787.

Mr. COFFEY. All right. And did you indicate that the MIA question might be covered by a provision in DOPMA as well?

Captain WILLIAMS. Yes, sir.

Mr. COFFEY. Is there anything else that would relate to the proposed DOPMA legislation?

Captain WILLIAMS. There would be a number of other items that would relate. However, they are not the ones that we are asking for special consideration on, and they are not included in Mr. Niederlehner's statement.

Mr. COFFEY. The list of items on page 7 where it talks about disability retirement, is that covered?

Captain WILLIAMS. No, sir. That would be a separate problem. That would have to be addressed in any revision that might come forth on the disability retirement system.

Mr. COFFEY. All right. Thank you very much.

Mr. FLOWERS. If nobody has any more questions, I thank you gentlemen for being with us. And I will ask that the GSA, represented by Mr. Phillip G. Read, Director of the Federal Procurement Regulations in the Office of Federal Management Policy, come forward and we will hear from him next. Thank you very much, gentlemen.

Mr. NIEDERLEHNER. Mr. Chairman, thank you very much. We appreciate the opportunity to appear.

[The prepared statement of Mr. Niederlehner follows:]

STATEMENT OF LEONARD NIEDERLEHNER, DEPUTY GENERAL COUNSEL,  
DEPARTMENT OF DEFENSE

Mr. Chairman and Members of the Committee, I am very pleased to have the opportunity to offer comments of the Department of Defense on H.R. 3884, "A Bill to terminate certain authorities with respect to National Emergencies still in effect, and to provide for orderly implementation and termination of future National Emergencies."

The Department of Defense favors the goal of H.R. 3884 to terminate obsolete or unnecessary authorities based upon states of emergency. However, a relatively small number of the authorities currently dependent upon a state of emergency affect contracting procedures, personnel entitlements, and organizational structure of the Department of Defense; and it is believed that the Congress will want to enact permanent legislation to treat with these various subject matters. Legislative proposals have been made to the Congress dealing with most of these items and it is hoped that they will receive attention in the near future. However, we recommend that they be exempted from the broad sweep of the pending bill until such time as the Congress has an opportunity to consider whether, and in what form, these authorities should be enacted into permanent law.

World and national conditions have changed since President Truman officially proclaimed the state of national emergency in 1950 incident to the commencement of hostilities in Korea. Many authorities which were used then for the first time were regarded as extraordinary. Since then, experience has demonstrated a need for these authorities in the regular conduct of the day-to-day operations of the Department of Defense. The desirability of terminating existing states of emergency is recognized and no objection to their termination is entertained by the Department of Defense. However, there are certain continuing needs which are accommodated by the existing national emergency proclaimed by President Truman in 1950 but which are not specifically provided for in H.R. 3884. The bill should provide an exception for each of the items I shall now refer to until such time as the Congress is able to consider permanent legislation to meet the particular need.

#### 1. CONTRACTING AUTHORITY

(a) Since 1941, there has been available to the Department of Defense authority to deal with unusual contract circumstances. Termination of the national emergency would terminate such authority of the Department of Defense (and certain other agencies) under Public Law 85-804 (50 U.S.C. 1431-1435), the current form of the 1941 statute. This statute provides authority to correct mistakes in contracts, to formalize informal commitments, to indemnify contractors against losses or claims resulting from unusually hazardous risks to which they might be exposed during the performance of a contract and for which insurance, even if available, would be prohibitively expensive, and to grant other extraordinary contractual relief. The Commission on Government Procurement, established by Public Law 91-129, recommended to the Congress in 1972 that the authorizations of Public Law 85-804 be made available generally rather than being dependent upon the existence of a state of war or national emergency.

(b) The procurement process within the Armed Services is utilized to accomplish certain major social and economic policies by the placement of contracts in labor surplus areas and in disaster areas, by letting contracts to favor small business, and to achieve a balance of payments favorable to the United States. These collateral policies are achieved through the emergency exception to the requirement for formal advertisement under the Armed Forces Procurement Act (10 U.S.C. 2304(a)(1)). The use of this emergency exception is limited by regulation (32 CFR 3-201) to the achievement of the enumerated policies. In the light of the importance attached to these social and economic purposes, Congress should have the opportunity to consider the establishment of appropriate contracting procedures on a permanent basis.

#### 2. PERSONNEL ADMINISTRATION

A number of personnel procedures which have become basic to the current military structure are based upon a state of emergency. Major legislative proposals which place many of these personnel procedures on a permanent basis have been proposed but have not been enacted. The latest and most comprehensive of these



proposals, the Defense Officer Personnel Management Act, was introduced in January, 1974, but was not acted upon. It will be resubmitted to the new Congress in 1975 and, if passed by the Congress, will cure most of the problems I shall now mention. These problems can be classified under two categories—those that deal with Defense organization and those that deal with personnel entitlements.

#### *a. Defense organization*

(1) Retention of the emergency authority of 10 U.S.C. 3444 and 8444 is required for the following purposes:

(a) To provide the authority to make temporary appointments of officers in the Chaplain, Judge Advocate, and Medical fields, who, because of constructive service credit in their specialties, are considered for permanent promotion earlier than line officer counterparts, and whose separation for failure of promotion might become mandatory under conditions inconsistent with the needs of the service.

(b) To provide the authority of the President as Commander in Chief to grant temporary appointments to exceptional officers of the Army or Air Force. (The promotion of the Air Force astronauts.)

(c) To provide the authority to appoint alien doctors in the Army and Air Force as officers to meet critical shortages of military medical personnel.

(2) Over a period of years the personnel structure in the naval service has developed around several emergency authorities which now form the basis of officer management. These authorities include:

(a) 10 U.S.C. 5231(c), which suspends existing limitations on the number of admirals and vice admirals of the Navy. If this authority is not continued, the Navy would lose approximately one-half of its three- and four-star admirals.

(b) 10 U.S.C. 5232(b) suspends existing limitations on lieutenant generals of the Marine Corps. If this authority is not continued, the Marine Corps would lose five of the currently authorized seven lieutenant generals.

(c) 10 U.S.C. 5711(b) authorizes the suspension of the statutory limit of 5% for early promotion selections specified in section 5707(c).

(d) 10 U.S.C. 5785(b) is needed to suspend time-in-grade requirements for promotion to all Navy and Marine Corps grades except lieutenant and lieutenant commander. This statute is also the authority for suspension of the mandatory promotion selection rate provisions for certain staff corps officers to grades below rear admiral.

(e) 10 U.S.C. 5787 provides for temporary promotions in the Navy. Failure to retain this authority would require approximately 650 limited duty officers in the grade of lieutenant commander to revert to the grade of lieutenant. Discontinuance of this authority would also require Senate confirmation of all Regular promotions to lieutenant (junior grade).

#### *b. Personnel entitlements*

(1) There are currently 913 members of the armed forces who are listed as missing in action in Southeast Asia. Only the emergency authority of 10 U.S.C. 3313, 6386(c), and 8313 authorizes the suspension of mandatory separation and retirement requirements which would otherwise be applicable to allow some of these members to remain in the armed forces until they return or are accounted for. Whether or not their situation is viewed as warranting continuation of a national emergency, it would be inequitable to force their separation or retirement while they are in a missing status.

(2) Termination of the 1950 national emergency would also terminate entitlement to disability retirement or separation benefits under 10 U.S.C. 1201 and 1203 for members with less than 8 years of service whose disability of 30 per cent or more, although incurred in line of duty while on active duty, was not the proximate result of the performance of active duty. Loss of this eligibility—which would affect only the junior officers and enlisted men—is particularly untimely when the armed forces are endeavoring to meet their manpower needs through voluntary means.

The Department recommends the deletion from the bill of subsection 602(a)(2) "Section 673 of title 10, United States Code;" this statute provides authority to order to active duty members of the Ready Reserve "In time of national emergency declared by the President after January 1, 1953." This statute would not be affected by termination of existing emergencies.

In view of the need for continuation of the authorities I have referred to, the Department of Defense recommends that any legislation terminating emer-



gency powers except the cited statutes from its effect until such time as the Congress has the opportunity to consider the necessity for permanent legislation.

Finally, there is one procedural requirement of H.R. 3884 which is not realistic. I refer to the provision in subsection 501(c) which requires a report to Congress on total expenditures within thirty days after the end of each quarter during a national emergency period. The thirty-day reporting requirement does not provide sufficient time to collect the required data for transmittal to Congress. Ninety days would be more appropriate to accomplish the task properly.

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**NATIONAL LEAGUE OF FAMILIES OF  
AMERICAN PRISONERS AND MISSING IN SOUTHEAST ASIA,  
Washington, D.C., April 11, 1975.**

HON. WALTER FLOWERS,  
*Chairman, Subcommittee on Administrative Law and Governmental Relations,  
Washington, D.C.*

DEAR CHAIRMAN FLOWERS: As Executive Director of the National League of Families of American Prisoners and Missing in Southeast Asia and on behalf of the families and their Missing and Prisoners of War loved ones, I am requesting that certain key provisions be exempted from the National Emergencies Act (H.R. 3884).

The reason for this request is to prevent a premature separation from service of any man that is classified POW or MIA in Southeast Asia. I don't believe any service has such a classification as Colonel John Doe, POW/MIA retired. I know we don't want one.

It is my understanding that under Section 602(a) of H.R. 3884 such exemptions may be made. I believe the specific exemptions would be covered in 10 U.S.C. § 3313; 10 U.S.C. § 6386(c) and 10 U.S.C. § 8313.

Very truly yours,

E. C. "BUS" MILLS,  
*Executive Director.*

Mr. FLOWERS. Thank you very much. Mr. Read, if you will identify those that you have with you and proceed as you see fit. We are running short on time and we apologize for this, but hopefully we will not have as many questions to ask GSA as we did Defense. Proceed, sir.

**TESTIMONY OF PHILLIP G. READ, OFFICE OF FEDERAL MANAGEMENT POLICY, GENERAL SERVICES ADMINISTRATION, ACCOMPANIED BY: CHARLES CURCIO, ASSISTANT GENERAL COUNSEL, GSA; AND THOMAS HAGAN, OFFICE OF PREPAREDNESS, GSA**

Mr. READ. Thank you, Mr. Chairman. I have with me on my left Mr. Charles Curcio, Assistant General Counsel of the General Services Administration, and on my right Mr. Tom Hagan, who is with our Office of Preparedness, Office of General Services Administration.

It is indeed a pleasure to have this opportunity to present to this committee the views of the General Services Administration regarding H.R. 3884, a bill to terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies.

Before commenting on the details of this proposed legislation, I would like to say a few words about the basis of GSA's interest in the bill. Among other things, the bill would have a direct impact on procurement by executive agencies and GSA is concerned with Government procurement in several ways.

I would like to depart from my prepared statement at this point to just make this observation. We do not present any personnel problems to you this morning.

First, GSA buys a wide range of items of personal property including automated data processing equipment, and nonpersonal services, including construction. GSA is also concerned with leases of real property.

Second, GSA is responsible for the issuance of the Federal procurement regulations which are applicable to the procurement of civilian executive agencies. GSA is charged with this responsibility by the Federal Property and Administrative Services Act of 1949, as amended by the Office of Federal Procurement Policy Act. Let me add to that remark that the Federal procurement regulations are prescribed by the Administrator of General Services in chapter 1 of title 41 of the Code of Federal Regulations.

Third, Executive Order 11717 transferred certain responsibilities regarding procurement and other matters to GSA that previously were handled by the Office of Management and Budget. In connection with that order, the President issued a statement on May 22, 1973, which directed GSA to assume a broader management role by becoming the President's principal instrument for developing better systems for providing administrative support to all executive branch activities.

A matter of continuing concern to GSA is its ability to effectively discharge its procurement responsibilities—in this sense I have reference to our direct procurement and contracting activities—and to issue regulations. And which will facilitate the Government procurement process.

Now, let me indicate how H.R. 3884 is related to the procurement process. This occurs in three ways; namely, in connection with the authority to negotiate Government contracts, the assignment of claims under Government contracts, and the leasing of real property.

Regarding the negotiation of contracts, section 302(c)(1) of title Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252, permits civilian executive agencies to negotiate contracts in certain specified situations. One of these situations involves contracts where it is "determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress."

The national emergency authority to negotiate is relied upon as the procedural basis for the award of contracts involving unilateral set asides for small business concerns, partial set asides for labor surplus area concerns, and the limitation of certain contracts to the procurement of domestic end products in the interest of improving the U.S. balance of payments. No other negotiation authority is available. As a result, awards for these three very worthwhile purposes would have to be discontinued if a declaration of national emergency ceased to exist or if some other negotiation authority is not provided.

I would like here to supplement my prepared statement with some remarks concerning a question you asked Mr. Niederlehner, Mr. Chairman. The question involved your concern about any ongoing activities to provide additional legislation as a substitute for the negotiating authority which we presently utilize, and which is paralleled in the

Armed Services Procurement Act and is utilized by the Defense Department. As Mr. Niederlehner indicated, the Commission on Government Procurement issued a very lengthy report, some 149 recommendations were included in the report, and one of the recommendations of the Commission was that the two basic procedural statutes under which the executive branch of the Federal Government does its procurements; namely, title III of the Federal Property and Administrative Procedures Act and the Armed Services Procurement Act be combined into one statute. Work is in process to accomplish that objective, and I believe that a bill was introduced during the last Congress. As I recall it was H.R. 9061, which was in the nature of a combined statute. The proposal that was initiated at that time, and work is still continuing on a similar bill, would eliminate the series of negotiating exceptions which are enumerated in the Property Act and the Armed Services Procurement Act. In lieu thereof the current proposals contemplate a general authority to negotiate on a competitive basis. And I believe that this legislation, if enacted, would provide us with the negotiating authority we need in order to make unilateral set asides for small business, partial set asides for labor surplus and the limitation of procurement to domestic sources for balance-of-payments purposes. So there is, in fact, work in process in this area, and it basically responds to one of the recommendations of the Commission on Government Procurement.

With respect to the assignment of claims, the provisions of the Assignment of Claims Act of 1940, 31 U.S.C. 203 and 41 U.S.C. 15, permit claims for moneys due or to become due a contractor from the Government to be assigned to a bank, trust company or other financing institution. This is a useful means for financing Government contracts, but initially the usefulness of assignments was impaired because they were deemed to be subject to reductions or set off by the Government. To remedy this situation, the act was amended to prohibit reductions or set offs during periods of war or national emergency. It follows, therefore, that a desirable means of financing Government contracts would be sharply curtailed if a declaration of national emergency ceased to exist or if some other authority to prohibit reductions or set offs is not provided.

The leasing of space is subject to statutory limitations, 40 U.S.C. 278(a), regarding permissible expenditures for rentals and for alterations and improvements. On occasion, situations arise where these limitations are not in the national interest. As a result, statutory authority, 40 U.S.C. 278(b), has been provided which makes the limitations inapplicable during a national emergency. The continued availability of the national emergency authority or some alternate authority is essential to the regular functioning of the Government.

In connection with our concern for the continued availability of the four statutory authorities I have referenced, we are gratified to note that section 602 of the bill contains a savings provision which states that the bill is not applicable to six statutes, including the four referenced statutes, except to provide for a review of these statutes by the appropriate committees of the Senate and the House of Representatives. Following the review, the committees would make recommendations and propose revisions to their respective Houses within 270 days

after enactment of the bill. This arrangement should insure the continued availability of necessary procurement authority.

Our remaining concern regarding this proposed legislation involves the reporting requirements in section 501(c). We appreciate that the Congress needs information in order to discharge its obligations under the bill. It seems doubtful, however, that a report of total expenditures will satisfy the congressional need. Furthermore, the submission of reports within 30 days after the end of each 3-month period following a declaration of emergency would be extremely difficult.

Regarding the utility of the report, small expenditures may relate to contract awards of extreme importance to the national interest. Conversely, large expenditures may bear little relationship to matters of national concern. Thus, some narrative explanation probably would be necessary or the Congress may find the reports inadequate for its purposes.

With respect to the 30-day reporting period, literally thousands of government offices may be involved in the reporting operation whenever a declaration triggers the reporting requirement. Initial reports inevitably will be late and past experience indicates that regular submissions may not satisfy a 30-day schedule.

As an alternative arrangement, we suggest that the reporting requirement be revised to require a very brief narrative statement, on an agency-by-agency basis, regarding the use of a given declaration of national emergency and the consequences of a termination of the authority.

With respect to the bill generally, we would not oppose its enactment. Our only concerns are the continued availability of authority to achieve necessary procurement objectives and the adoption of appropriate procedures for the administration of the bill.

This concludes my prepared statement, Mr. Chairman. I would be pleased to respond to any questions you may wish to raise.

Mr. FLOWERS. I would just ask by way of getting on for you to reiterate concisely, sir, the four major concerns that you discussed in the early part of your statement which are covered by the savings clause in the bill that have been used, is that correct?

Mr. READ. That is correct.

Mr. FLOWERS. Your other major concern then is merely the time in which to report and the kind of report, is that correct?

Mr. READ. That is correct, Mr. Chairman.

Mr. FLOWERS. Thank you very much. I will ask Mr. Danielson if he has any questions.

Mr. DANIELSON. I have a couple, really on one subject. I understand your statement and I am not going to belabor it.

I am trying to grasp for the application of these emergency provisions. In your point 1(b), on negotiating unilateral set asides for small business, partial set asides for labor surplus, balance of payments, and again on your leasing on page 4, the leasing of space, you apparently are able to disregard these statutory limitations in title 40, section 278(a) because of the 278(b) proviso that as long as there is an emergency you can ignore 278(a)?

Mr. READ. Correct.

Mr. DANIELSON. You are operating, I assume, as was Defense on the Korean emergency?

Mr. READ. That is right, the Truman emergency statement of 1950.

Mr. DANIELSON. Am I correct in assuming that there may have been times when you have invoked 278(b) and been able to avoid the use of the limitations in 278(a) because the Korean emergency is still in effect? You do that I presume, do you not?

Mr. READ. That is correct.

Mr. DANIELSON. I thought it was. Otherwise you would not be here worrying about the authority expiring.

Mr. READ. We had an experience—

Mr. DANIELSON. Do you suppose, sir, there may have been a few cases in which, and I do not think this is illegal, so I want to disarm you of the defense tactic here, but do you suppose you might have invoked 278(b) on a few cases that did not relate to the Korean war?

Mr. READ. Well, I cannot say that the prime case that we had in mind related to the Korean situation but it was an emergency. We had a fire which started to burn up a substantial quantity of personnel records of the Federal Government, and but for the emergency leasing authority which permitted us to move the records quickly into a facility that was not subject to being demolished, we might have lost more of the records. There really was an emergency in that case and it did not relate to Korea. However, it was a very present thing.

Mr. DANIELSON. And on these permissible expenditures for rentals for alterations, improvements, it is alterations and improvements. I would imagine you gentlemen in the work of GSA, leasing real estate all over the country, office space, probably for some of us, who knows, you are able to ignore the limitations of 278(a) in what you consider to be a proper case regardless of the status of the war in Korea?

Mr. READ. I think that is a fair statement.

Mr. DANIELSON. I get your point, and I would just like to say that in sum of your whole statement are you not saying this: You are not opposed to the enactment of H.R. 3884, provided that something is done by the appropriate committee and the Congress to see to it that you have what you consider the essential authority to operate in the real world of 1975?

Mr. READ. That is correct. We, I think quite clearly have an obligation to achieve some very significant socioeconomic objectives which the Congress has endorsed over the years. Other objectives have been sponsored by the President. For example, assistance to labor surplus areas by way of a Presidential policy statement which we have operated under for several years, and that sort of thing.

Mr. DANIELSON. I am going to suggest this as a friendly recommendation, because I have got a feeling that this committee is going to get on with this bill, if you would sit down and work out a draft of some proposed legislation, or a legislative program to take care of your real needs in a form of substantive law, and let us get off of this hangup of emergencies. You know, we are just kidding ourselves here.

Mr. READ. Well, as I indicated in my earlier remarks, I think that if the work continues on H.R. 9061, pursuant to the recommendation of the Commission on Government Procurement for a combined procedural permanent statute, that the problem of negotiating authority for the three situations I mentioned will be resolved.

Mr. DANIELSON. Perhaps if we move ahead with alacrity here that will give them a motivation to move a little faster on the other side. I thank you.

Mr. FLOWERS. Let me say to the gentleman from California that I finally got my office painted in Tuscaloosa in the Federal building, and I am wondering if that was done under emergency powers.

The gentlelady from Texas.

Ms. JORDAN. Just one question. Are you proposing, Mr. Read, an amendment to the accounting procedures as they are set out in the bill?

Mr. READ. Are you talking about the assignment of claims?

Ms. JORDAN. No.

Mr. READ. Oh, reporting; yes, it would seem to me that we have two problems there. One is the ability of the farflung offices of the executive branch to respond and to provide the statistical information on a 30-day basis. The second is whether when you get the information it will really be meaningful and helpful to you to arrive at a decision.

Ms. JORDAN. Well, would the 30-day limitation in there pose a hardship on your agency?

Mr. READ. I think it would be extremely difficult for all of the agencies of the Federal Government.

Ms. JORDAN. Let us just talk about your agency. Could you do it?

Mr. READ. We could do it with difficulty. We have reporting mechanisms now that work on a slightly longer arrangement, 45 days, and even with 45 days we find that a number of offices are late. So from experience we find that a 30-day period is a very tight time frame in which to operate.

Ms. JORDAN. But you could do it?

Mr. READ. We can certainly try.

Ms. JORDAN. No further questions.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Thank you very much, Mr. Chairman. Perhaps the question has been asked in my absence, but if it has not, was there any connection between the use of national emergencies for things like set-asides in contracts and partial set-asides for labor surplus area concerns, and the assignment of claims and leasing of space?

Mr. READ. It is difficult to find a relationship between a national emergency and the three situations that I alluded to, small business, labor surplus and balance of payments. To be perfectly frank, we were faced with a procurement problem which had to be handled on a negotiated basis. It was not possible to formally advertise the procurement actions that were involved in those three areas. The current procedural statutes that both the Defense Department and the civilian agencies operate under have specifically enumerated negotiating situations. There was no specific situation that would fit any one of these three areas, so the only thing we could rely on was the national emergency authority, based on a declaration of national emergency. Perfectly honestly, it was the only authority we had available and the only thing that we could rely on. Without it we simply could not have proceeded with those three programs.

We have felt for many years that some kind of permanent legislation for these purposes would be a better arrangement.

Mr. MAZZOLI. And have you proposed such permanent legislation?

Mr. READ. At the present time, as I indicated a little bit earlier, a bill was introduced in the House during the last session that would combine the two procedural statutes under which the Federal Government operates, and would provide us with the negotiating authority that we need without reference to a national emergency.

With respect to the assignment of Claims Act, I think that was a matter that grew out of a wartime situation and the solution was based on a declaration of national emergency. Here again, I think that there is no realistic relationship between the reference to reductions or setoffs and the national emergency. I think we can solve this problem by permanent legislation.

Mr. MAZZOLI. Has this been introduced, Mr. Read?

Mr. READ. No; this has not been introduced.

Mr. MAZZOLI. Do you plan to have or is there a piece of legislation in the works in your Department to do so?

Mr. READ. There is no legislation in the works in our Agency, or to the best of my knowledge did the Commission on Government Procurement address itself to this problem. But it was one I think that we would most assuredly recommend to the new Office of Federal Procurement Policy for its consideration as an ongoing matter.

Mr. MAZZOLI. How about the last one in the leasing of space? Is that of the same category as the assignment of claims—not really directly involved in a national emergency, but better handled by some permanent legislation?

Mr. READ. I would think this could quite properly be handled by permanent legislation. I think it is probably another one of these items that has grown up over the years, but at this point could be handled on a permanent basis.

Mr. MAZZOLI. Thank you very much.

Mr. FLOWERS. Thank you, Mr. Pattison?

Mr. PARTISON. I have no questions.

Mr. FLOWERS. I would like to yield to counsel. Do you have a question?

Mr. SHATTUCK. Yes; Mr. Chairman, I believe in your statement or in the response to a question you indicated that there were some parallels between the problems faced by the Defense Department in the contract area and the provisions in the bill and the ones that you have referred to, is that correct?

Mr. READ. Yes; you recall Mr. Niederlehner made reference to the small business, labor surplus, balance-of-payments problems. You see, when the Armed Services Procurement Act was passed in 1947, it was really in its day the modernized procurement statute. In 1949, the title 3 of the Property Act was passed, and it was virtually a mirror image of the Armed Services Procurement Act. The two statutes provided the same procedural basis for all Government procurement with the result that formal advertising was preferred, but we were permitted to negotiate in certain situations which were enumerated in both statutes. When over the years we encountered the problem of negotiating a unilateral small business set asides, or partial set asides for labor surplus areas, or procurements of domestic products for balance-



of-payments purposes, the Department of Defense under its statute, the Armed Services Procurement Act, and the GSA and all of the civilian executive agencies under the Property Act had exactly the same problem; namely, what negotiating authority to rely on.

The Defense Department relies on the national emergency negotiating authority in the Armed Services Procurement Act and we on the civilian side rely on the national emergency negotiating authority to the Federal Property Act. The two statutes are parallel. We have the same problem, and we rely on the same kind of authority but in two different statutes.

Mr. SHATTUCK. If that is the case, why does not the bill have an exception for the parallel provision in the Armed Services Procurement Act?

Mr. READ. We asked ourselves the same question as we sat here looking at the list of exceptions this morning, and I really do not know the answer.

Mr. SHATTUCK. Since its provisions are essentially identical?

Mr. READ. Yes, they are, and I would think the logic of the matter would be to include the Armed Services Procurement Act in that laundry list.

Mr. SHATTUCK. Well, since this bill was evolved in consultation with particularly the Office of Management and Budget, I just wondered why that was not true?

Mr. READ. Well, I regret that I cannot respond to your question. I do not know what the mental processes might have been in OMB with regard to the matter.

Mr. SHATTUCK. Thank you, perhaps it was an unfair question.

The other point I just wanted to raise in passing is that the bill, H.R. 9061, along with H.R. 9062 was referred to this committee last year. We requested departmental reports from GSA and from the Defense and other principal contracting agencies. But I take it that that request may have triggered the study of the provisions that you have just referred to?

Mr. READ. Well, we are currently looking at the bill and considering what we think would be appropriate suggestions for changes. We are in the process of working with the Office of Federal Procurement Policy on the matter, so if you do not have it, I would anticipate that it would be coming forward in the foreseeable future. Certainly, from the executive branch standpoint, we are working actively on the matter.

Mr. SHATTUCK. Thank you very much.

Mr. FLOWERS. Mr. Coffey?

Mr. COFFEY. No questions.

Mr. FLOWERS. Thank you very much. Does anyone else have any further questions?

Well, we will thank you gentlemen for being with us as we did the others, and we appreciate your help on this particular matter.

[The prepared statement of Mr. Read follows:]

STATEMENT BY PHILIP G. READ, DIRECTOR, FEDERAL PROCUREMENT REGULATIONS STAFF, OFFICE OF FEDERAL MANAGEMENT POLICY, GENERAL SERVICES ADMINISTRATION

Mr. Chairman and members of the Committee, I am Philip G. Read, Director, Federal Procurement Regulations Staff, Office of Federal Management Policy, General Services Administration. It is indeed a pleasure to have this opportunity



to present to this committee the views of the General Services Administration regarding H.R. 3884, a bill to terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies.

Before commenting on the details of this proposed legislation, I would like to say a few words about the basis of GSA's interest in the bill. Among other things, the bill would have a direct impact on procurement by executive agencies and GSA is concerned with Government procurement in several ways.

First, GSA buys a wide range of items of personal property (including automated data processing equipment) and non-personal services (including construction). GSA is also concerned with leases of real property.

Second, GSA is responsible for the issuance of the Federal Procurement Regulations which are applicable to the procurement of civilian executive agencies. GSA is charged with this responsibility by the Federal Property and Administrative Services Act of 1949, as amended by the Office of Federal Procurement Policy Act.

Third, Executive Order 11717 transferred certain responsibilities regarding procurement and other matters to GSA that previously were handled by the Office of Management and Budget. In connection with that order, the President issued a statement on May 22, 1973, which directed GSA to assume a broader management role by becoming the President's principal instrument for developing better systems for providing administrative support to all executive branch activities.

A matter of continuing concern to GSA is its ability to effectively discharge its procurement responsibilities and to issue regulations which will facilitate the Government procurement process.

Now, let me indicate how H.R. 3884 is related to the procurement process. This occurs in three ways, namely, in connection with the authority to negotiate Government contracts, the assignment of claims under Government contracts, and the leasing of real property.

Regarding the negotiation of contracts, section 302(c)(1) of Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 252), permits civilian executive agencies to negotiate contracts in certain specified situations. One of these situations involves contracts where it is "determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress."

The national emergency authority to negotiate is relied upon as the procedural basis for the award of contracts involving unilateral set asides for small business concerns, partial set asides for labor surplus area concerns, and the limitation of certain contracts to the procurement of domestic end products in the interest of improving the U.S. balance of payments. No other negotiation authority is available. As a result, awards for these three very worthwhile purposes would have to be discontinued if a declaration of national emergency ceased to exist or if some other negotiation authority is not provided.

With respect to the assignment of claims, the provisions of the Assignment of Claims Act of 1940 (31 U.S.C. 203 and 41 U.S.C. 15), permit claims for monies due or to become due a contractor from the Government to be assigned to a bank, trust company or other financing institution. This is a useful means for financing Government contracts, but initially the usefulness of assignments was impaired because they were deemed to be subject to reductions or set off by the Government. To remedy this situation, the Act was amended to prohibit reductions or set offs during periods of war or national emergency. It follows, therefore, that a desirable means of financing Government contracts would be sharply curtailed if a declaration of national emergency ceased to exist or if some other authority to prohibit reductions or set offs is not provided.

The leasing of space is subject to statutory limitations (40 U.S.C. 278(a)) regarding permissible expenditures for rentals and for alterations and improvements. On occasion, situations arise where these limitations are not in the national interest. As a result, statutory authority (40 U.S.C. 278(b)) has been provided which makes the limitations inapplicable during a national emergency. The continued availability of the national emergency authority or some alternate authority is essential to the regular functioning of the Government.

In connection with our concern for the continued availability of the four statutory authorities I have referenced, we are gratified to note that section 602 of the bill contains a savings provision which states that the bill is not applicable to six statutes (including the four referenced statutes), except to provide for

a review of these statutes by the appropriate committees of the Senate and the House of Representatives. Following the review, the committees would make recommendations and propose revisions to their respective Houses within 270 days after enactment of the bill. This arrangement should ensure the continued availability of necessary procurement authority.

Our remaining concern regarding this proposed legislation involves the reporting requirements in section 501(c). We appreciate that the Congress needs information in order to discharge its obligations under the bill. It seems doubtful, however, that a report of total expenditures will satisfy the Congressional need. Furthermore, the submission of reports within 30 days after the end of each 3 month period following a declaration of emergency would be extremely difficult.

Regarding the utility of the report, small expenditures may relate to contract awards of extreme importance to the national interest. Conversely, large expenditures may bear little relationship to matters of national concern. Thus, some narrative explanation probably would be necessary or the Congress may find the reports inadequate for its purposes.

With respect to the 30 day reporting period, literally thousands of Government offices may be involved in the reporting operation whenever a declaration triggers the reporting requirement. Initial reports inevitably will be late and past experience indicates that regular submissions may not satisfy a 30 day schedule.

As an alternative arrangement, we suggest that the reporting requirement be revised to require a very brief narrative statement, on an agency by agency basis, regarding use of a given declaration of national emergency and the consequences of a termination of the authority.

With respect to the bill generally, we would not oppose its enactment. Our only concerns are the continued availability of authority to achieve necessary procurement objectives and the adoption of appropriate procedures for the administration of the bill.

This concludes my prepared statement, Mr. Chairman. I would be pleased to respond to any questions you may wish to raise.

Mr. FLOWERS. We will call this meeting to a close and continue on Wednesday, April 9, which is a week from next Wednesday, in room 2226 at 10 a.m. when we will receive testimony from Justice and State, and hopefully that will conclude, at least as far as we have any knowledge, our hearings on this matter.

Thank you very much, gentlemen.

[Whereupon, at 11:53 a.m., the hearing was concluded subject to the call of the Chair.]

# NATIONAL EMERGENCIES ACT

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WEDNESDAY, APRIL 9, 1975

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ADMINISTRATIVE LAW  
AND GOVERNMENTAL RELATIONS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice at 10:30 a.m., in room 2226, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Jordan, Mazzoli, and Moorhead.

Also present: William P. Shattuck, counsel; and Alan F. Coffey, Jr., associate counsel.

Mr. FLOWERS. The subcommittee will come to order.

Our first witness this morning is Mr. Mark Feldman, Deputy Legal Adviser, Department of State. Mr. Feldman, if you would like to proceed, we will be delighted to hear your testimony at this time.

## TESTIMONY OF MARK B. FELDMAN, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Mr. FELDMAN. Thank you, Mr. Chairman.

The Department of State appreciates the opportunity to testify on H.R. 3884, a bill "to terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies." This bill is very much the same as S. 3957 passed by the Senate last session.

The Department of State believes that it is appropriate to reexamine the national emergency authorities at this time, to repeal obsolete authorities, and to set criteria for national emergencies which may be declared in the future. H.R. 3884 does this, and at the same time preserves major emergency authorities that are essential to the conduct of foreign relations. The Department wishes to speak particularly in support of section 602 of H.R. 3884 which preserves essential authorities.

The Department of State is primarily concerned with section 5(b) of the Trading With The Enemy Act, which provides the basic legal authority for a number of programs of major foreign policy importance. These include:

Foreign assets control regulations, Cuban asset control regulations, and foreign funds control regulations.

Under these programs, transactions are prohibited which involve persons or property subject to U.S. jurisdiction and which take place with Cuba, North Vietnam, North Korea, and designated nationals

of those countries, unless specifically or generally licensed. In addition, property in which those countries or their nationals have an interest has been blocked and is under U.S. Government control. We also are holding assets of the People's Republic of China, blocked before May 1971, and assets of certain Eastern European countries. While the amounts of the blocked assets vary, in some cases it is substantial, for example possibly in excess of \$80 million in the case of the People's Republic of China.

Mr. Chairman, an interruption of these programs would seriously prejudice the foreign relations interests of the United States and the interests of thousands of American nationals with outstanding claims against Cuba and the People's Republic of China. One effect of such interruption would be to release the blocked assets. Another would be to authorize transactions now prohibited without regard for the state of United States relations with countries concerned or the Cuban imports could come into the United States without regard to other economic issues, and the relaxation of transaction controls with respect to North Vietnam would be without regard to any context of improved bilateral relations. As a result it would become very difficult, if not impossible, to negotiate satisfactory claims settlements, or to realize other U.S. objectives.

The Department wishes to stress that these are merely the current programs under section 5(b) of the Trading With the Enemy Act and the 1950 proclamation of national emergency. This authority has been utilized in the past for programs which have served their purposes and been terminated, and it may be necessary again. The present international situation has the potential for serious difficulties in international fiscal and economic matters, particularly in the energy area, which may call for measures requiring recourse to this authority. Therefore, the Department believes it is essential that section 5(b) of the Trading With the Enemy Act be specifically exempted as section 602 now provides.

The Department has not opposed, and does not oppose, the replacement of section 5(b) by other permanent legislation. We do believe, however, that there are a number of serious legal and policy questions in connection with any such legislation that will require protracted congressional consideration, and we are convinced that it would be highly imprudent to cast away the authority of section 5(b) without any assurance of such a replacement.

Mr. Chairman, at this point I would like to make a comment on another authority which I did not include in my prepared statement, but which is of concern to the Department of State, section 215 of the Immigration and Nationality Act, and the existing proclamation of national emergency are the only current authority for requiring American citizens to have a valid passport for leaving and entering the United States. I am advised that in the absence of this authority the Immigration and Naturalization Service would have a substantial additional administrative burden of screening persons who claim to be American citizens but have no passport.

Under present practice, as I understand it, if an individual abroad doesn't have a passport, he would apply for one through our representatives abroad, and some of the screening would take place on the other side; and that facilitates the administrative burden in these matters.

What would happen, here, if this authority were not exempted from the effects of this legislation. After a year's time, when the current authorities dependent on a national emergency proclamation expire, we would have the option of declaring a national emergency for the purpose of continuing this authority, or hoping to obtain permanent legislation. Of the two, the latter would seem to be the better alternative.

So, we would ask the committee to consider whether this additional authority, section 215 of the Immigration and Nationality Act should not also be exempted for the reasons that I have given.

To sum up, the Department of State believes that H.R. 3884 preserves essential emergency authorities and eliminates obsolete ones, so the Department has no objection to its enactment, Mr. Chairman.

I will be happy to try to answer any questions.

Mr. FLOWERS. Thank you, Mr. Feldman.

Let me start at the end, then. This passport matter is sort of after the fact, as I understand it, it's not a part of the bill under consideration, there is no exemption; nor was it a part of the bill passed by the Senate last year. So, this is something that came up in later discussions.

Mr. FELDMAN. That's right.

Mr. FLOWERS. Let me just ask you very candidly, how much of a burden would that place? It doesn't appear to me, on the surface, to be a very great burden to be handled by State in the normal consular fashion, as other matters of that nature have.

Mr. FELDMAN. Mr. Chairman, I would like to be equally candid and say I can't speak of personal knowledge of the extent of the burden. I believe the burden would fall primarily on the Immigration and Naturalization Service. In the absence of a requirement for a passport—American citizens appearing at the port of entry, or others claiming to be American citizens appearing at the port of entry, would have to document themselves in some way.

Mr. FLOWERS. This, I think, typifies the basic reason for this sort of legislation. Here is something that is totally unrelated to any emergency, of securing a passport for someone that has perhaps been lost in Western Europe, is keyed in to a national emergency declared because of our conflict with North Korea.

It boggles the mind that we have structured activities totally unrelated to this matter, and hopefully we will be able to correct this kind of thing through legislation, or whatever is required. Perhaps the impetus might be this termination of emergency authority.

Well, let me move to the main thrusts of your comments. The statement regarding the People's Republic of China, and the blocking of assets before 1971, in that regard, what has the cutoff date of 1971 got to do with it? That is on page 2 of your statement.

Mr. FELDMAN. Yes, Mr. Chairman. I would prefer to supplement my testimony with a more precise answer, concerning the specific date. [See letter dated Apr. 15, 1975, at p. 88.]

It is obvious that over the last several years our relations with the Republic of China have been undergoing a change, and we have been moving in the direction of increased contacts of an economic as well as cultural and other character. I am sure the date does correspond to an administrative adjustment in that context.

Mr. FLOWERS. This just relates back to our new relationship with China, that is what you mean?

Mr. FELDMAN. I am sure it was a step along the way.

Mr. FLOWERS. We still have these assets blocked now, as we did in 1971.

Mr. FELDMAN. As I understand the situation, the Treasury Department has blocked assets up until May of 1971. Those that were blocked prior to that time remain blocked; and additional assets coming into the country have not been blocked since that date.

Mr. FLOWERS. I'm not sure exactly what assets we are talking about, we have always recognized a Government of China, and that has been the Taiwan Government until just recently. I just never got into this before, it appears to me, on the face of it, assets of the Government of China prior to 1950 would have remained thus in our official view; is this not the case?

Mr. FELDMAN. Mr. Chairman, that is a very good question. I asked the same question, and I am advised that at some point in the 1950's the Treasury Department actually went through a procedure in which individuals were designated as nationals connected with mainland China, and these assets were blocked. If they were not so designated, if the relationship was established with the Republic of China, then their assets, if they had been blocked, were released, or were not blocked, whichever the case may be.

I think we are here talking about assets, in many cases, of individuals, or firms with links, sufficient links to the mainland so that it was thought that the release of those assets would be for the effective benefit of the authorities in Mainland China.

Mr. FLOWERS. All right.

The further point that I would make, and it is really bordering on what we were talking about earlier, relating to, for instance, our blocking of any assets of the North Vietnamese to the 1950 Korean emergency, when as of 1950, of course, we had no real involvement even in that country; and it does signify, I think, the need for this type of legislation, that we deal with the emergency on the true basis of what is the emergency, rather than structure our system to gear it to some emergency declaration that relates to something else.

I don't think you disagree with that, either.

Mr. FELDMAN. No, Mr. Chairman.

Mr. FLOWERS. I have no further questions, does counsel on either side—Mr. Shattuck?

Mr. SHATTUCK. If I might, Mr. Chairman. I am returning to the point on the Immigration and Nationality Act, the passport requirement. Do you think the 1-year period would be sufficient time for permanent legislation on this?

Mr. FELDMAN. It seems to me that may be the best option. I would wish the opportunity to consult further in more detail, not only with the responsible officers in the State Department, but also the Immigration and Naturalization Service.

I agree with the Chairman that this may be a good illustration of the kind of legislation that was intended to be permanent. It has proved at least to have some significance, administrative significance, or substantive significance that is not necessarily connected with an emergency declared by the President, in which case a case could be

made out to persuade the Congress that the authority should be extended.

But, I would like to reserve a judgment on that question to provide an answer to the question after further consultation, if that is satisfactory.

Mr. FLOWERS. I'll put it this way, I stand ready to be convinced that you need an exemption in this area; but I'm not convinced right now.

Mr. FELDMAN. I appreciate that, Mr. Chairman. We were asking for the committee to consider this matter, and to give its best judgment.

Mr. FLOWERS. If the Department is serious about this, give us substantial reasons to give the exemption.

Mr. FELDMAN. I think that is a very fair request.

Mr. FLOWERS. Mr. Coffey?

Mr. COFFEY. Thank you, Mr. Chairman.

Mr. Feldman, when the Treasury Department was before us their testimony was quite similar to yours in their concern about the continuation of the Trading With the Enemy Act. They emphasized that cases interpreting the Trading With the Enemy Act indicate that an emergency had to be in effect to continue the validity of blocking, constitutionally. And I wonder whether you would like to comment as to whether you feel this legislation would cover that point sufficiently.

I mean that in terminating the powers and authorities that are connected to national emergencies that are in existence, does the exemption for the Trading With the Enemy Act adequately take care of the problem? Does it really continue an emergency for the Trading With the Enemy Act in that case, or does it really say it goes on in existence, or in effect, despite the fact that it was terminated? I am wondering how the courts might interpret it.

Mr. FELDMAN. Mr. Chairman, if I may, I will take the question in two parts. First, we are satisfied that the exemption of the Trading With the Enemy Act from the provisions of this bill will preserve the authority that we now have under the Trading With the Enemy Act, based on the 1950 proclamation, or other proclamations made by the President from time to time. This is a very important authority to us for all the reasons that I have testified.

It does not mean that we do not recognize the merit of proceeding with permanent legislation in this area, we do recognize the merit. But, there are a number of complexities both of a policy character and a legal character in attempting to draw up such legislation. We would not like to risk losing it now that we have a body of court cases which upheld the exercise of the authority under the act and the proclamation; and we don't believe it would be prudent to change the legal basis for our action with respect to those programs, and to risk new litigation and possibly different results.

So, we naturally would have urged a prudent course, and so far the Congress has seen the merit of this, as reflected in this bill.

Now, the first part of your question, as to the Treasury testimony raising questions about the intrinsic importance of a proclamation of national emergency for the type of authorities that are exercised under

the Trading With the Enemy Act. Frankly, this is an area of constitutional law; I am not the most qualified witness in the executive branch to testify on that. The Treasury has responsibility for administration of the program, and Justice the expertise in the constitutional area.

However, I think we would all recognize that we are talking about an area which is speculative. I am not persuaded that it would be impossible to draft permanent legislation that would withstand constitutional challenge; it is that issue that has been raised by the Treasury Department, and it is one of the legal complexities that would have to be seriously considered by Congress in drafting permanent legislation. We would have to see what the standards are that Congress would wish to provide, how much authority the President would be given under new legislation, considering the very different circumstances and measures that historically have been engaged under the Trading with the Enemy Act.

Mr. SHATTUCK. That would be prospective in force, would it not?

Mr. FELDMAN. It would not have much value—

Mr. SHATTUCK. I mean, it would not be retroactive, it wouldn't cover the present problems.

Mr. FELDMAN. I think in any event, even if there were permanent legislation—and your question, your point is a good one—we would wish to have a savings clause that would preserve the present authority for the existing programs.

Mr. COFFEY. Is the kind of permanent legislation you are talking about a reality in the near future, has legislation like that been introduced, or is it even being drafted?

Mr. FELDMAN. Frankly, I don't believe that any attempt has been made to draft such legislation. I think this measure is an impetus for such consideration; and if I am not mistaken there are provisions in this bill for consideration by the substantive committee within a certain time period of these various substantive issues.

We are in favor of that consideration proceeding, and we would look forward, with other executive agencies, to cooperating with the appropriate committee in the drafting exercise. It is hard for me to see now whether we could find a better basis for granting the President the authority that we think he needs, than the concept of national emergency; but it may be possible to do so.

Mr. COFFEY. What do you think about a time limit on the exemption of the Trading with the Enemy Act?

Mr. FELDMAN. Our view is that the Trading with the Enemy Act is such an essential authority with the changing international scene as we have it now, that we would not wish to see any artificial time limit placed in the bill, because it remains to be seen whether the Congress will find agreement on a substitute in terms of permanent authority which will be as adequate as the Trading with the Enemy Act is now.

That is a terribly important authority, and the programs we have had have been very important in the past; and the world situation is under so many pressures at the moment that it's really hard to say where we might need to turn next.

Mr. COFFEY. Thank you. That is all, Mr. Chairman.

Mr. FLOWERS. This is not to embarrass the State Department in any way, I wouldn't want to tell of our recent successes in foreign policy under the Trading With the Enemy Act.



" I don't think I have any further questions, Mr. Feldman, I think you adequately covered the thing, and made a good case, along with the Treasury Department for the exemption of the Trading With the Enemy Act; I don't think the committee will have any problem with that.

Let me say once again, on the passport matter, if you furnish material we will be happy to receive it; and if you wish to elaborate on any other answer, we will be happy to receive it.

Mr. FELDMAN. Thank you very much, Mr. Chairman, I appreciate that invitation.

Mr. FLOWERS. Thank you for coming over.

[The prepared statement of Mr. Feldman follows:]

STATEMENT OF MARK B. FELDMAN, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Mr. Chairman, the Department of State appreciates the opportunity to testify on H.R. 3884, a bill "to terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies." This bill is very much the same as S. 3957 passed by the Senate last session.

The Department of State believes that it is appropriate to reexamine the national emergency authorities at this time, to repeal obsolete authorities, and to set criteria for national emergencies which may be declared in the future. H.R. 3884 does this, and at the same time preserves major emergency authorities that are essential to the conduct of foreign relations. The Department wishes to speak in support of section 602 of H.R. 3884 which preserves essential authorities.

The Department of State is primarily concerned with section 5(h) of the Trading with the Enemy Act (50 U.S.C. App. 5(b) and 12 U.S.C. 95a) which provides the basic legal authority for a number of programs of major foreign policy importance. These include:

1. Foreign Assets Control Regulations (31 C.F.R. Part 500);
2. Cuban Asset Control, Regulations (31 C.F.R. Part 515); and
3. Foreign Funds Control Regulations (31 C.F.R. Part 520).

Under these programs, transactions are prohibited which involve persons or property subject to United States jurisdiction and which take place with Cuba, North Viet-Nam, North Korea, and designated nationals of those countries, unless specifically or generally licensed. In addition, property in which those countries or their nationals have an interest has been blocked and is under United States Government control. We also are holding assets of the People's Republic of China blocked before May 1971 and assets of certain Eastern European countries. While the amounts of the blocked assets vary, in some cases it is substantial, for example possibly in excess of \$80 million in the case of the People's Republic of China.

An interruption of these programs would seriously prejudice the foreign relations interests of the United States and the interests of thousands of American nationals with outstanding claims against Cuba and the People's Republic of China. One effect of such interruption would be to release the blocked assets. Another would be to authorize transactions now prohibited without regard for the state of United States relations with countries concerned or the underlying United States interests served by these programs.

Thus for example, Cuban imports could come into the United States without regard to other economic issues, and relaxation of transaction controls with respect to North Viet-Nam would be without regard to any context of improved bilateral relations. As a result it would become very difficult, if not impossible, to negotiate satisfactory claim settlements, or to realize other United States objectives.

The Department stresses that these are merely the current programs under section 5(b) of the Trading with the Enemy Act and the 1950 proclamation of national emergency. This authority has been utilized in the past for programs which have served their purposes and been terminated, and it may be necessary again. The present international situation has the potential for serious difficulties in international fiscal and economic matters, particularly energy, which

may call for measures requiring recourse to this authority. Therefore, the Department believes it is essential that section 5(b) of the Trading with the Enemy Act be specifically exempted as section 602 now provides.

The Department of State has not opposed, and does not oppose, the replacement of section 5(b) by other permanent legislation. We do believe that there are a number of serious legal and policy questions in connection with any such legislation that will require protracted Congressional consideration and we are convinced that it would be highly imprudent to cast away the authority of section 5(b) without any assurance of such a replacement.

To sum up, the Department of State believes that H.R. 3884 preserves essential emergency authorities and eliminates obsolete ones, so the Department has no objection to its enactment.

I will be happy to try to answer any questions.

DEPARTMENT OF STATE,  
Washington, D.C., April 15, 1975.

Hon. WALTER FLOWERS,

*Chairman, Subcommittee on Administrative Law and Governmental Relations,  
Judiciary Committee, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: During my testimony on April 9, 1975, on H.R. 3884, I was asked for additional information on the May 1971 date given in my prepared statement as the cut-off for blocking of Chinese assets.

In May 1971 the Department of State requested the Department of Treasury to terminate blocking of current transactions involving China under 31 CFR 500.

On May 8, 1971, a Treasury order was issued for this purpose, and it is now incorporated in 31 CFR 500.546 (enclosed). The order preserves blocking actions prior to May 6, 1971.

I hope that this information answers your question.

Sincerely,

MARK B. FELDMAN,  
*Acting Legal Advisor.*

Enclosure.

§ 500.546 *Current transactions with China and its nationals authorized.*

(a) Except as provided in paragraph (b) of this section, all transactions with China or its nationals are hereby licensed.

(b) This section does not authorize:

(1) Any transaction prohibited by § 500.201 involving property subject to the jurisdiction of the United States as of May 6, 1971 in which China or any national thereof, at any time on or since December 17, 1950 had any interest whatsoever nor any transaction involving any income from such property accruing on or after May 6, 1971.

(2) Any transaction prohibited by § 500.201 and excepted from section 500.541 by subparagraphs (c) and (e) thereof.

(3) Any transaction prohibited by section 500.204.

(4) Any transaction involving an interest of North Korea or North Vietnam or nationals thereof.

[36 F.R. 8584, May 8, 1971]

Mr. FLOWERS. Now we have Mr. Scalia from the Justice Department. Assistant Attorney General, Office of the Legal Counsel. We will be delighted to hear from you, sir, fresh from the battles.

# TESTIMONY OF ANTONIN SCALIA, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. SCALIA. Yes, sir. Blue pin-striped suits seem to be the Executive branch uniform for today.

Mr. FLOWERS. That is just fine, we are delighted to have you both with us.

Mr. SCALIA. Mr. Chairman. I appreciate your rescheduling this testimony, by the way, so that I did not appear as the first witness. As

you know, I am trying to perform the forensic equivalent of the hat trick this morning, back-to-back testimony.

Mr. FLOWERS. If you are as successful as the Washington team was the last time, you'll be all right.

Mr. SCALIA. I'm alive.

Mr. Chairman, I have with me Jack Goldklang who is a staff attorney in the Office of Legal Counsel, and has worked on this particular legislation for some time.

Mr. FLOWERS. We have seen him around, and we are glad to have him sitting at the table today.

Mr. SCALIA. The situation we are addressing today has been building for 42 years. It was in March 1933 that President Roosevelt and Congress both declared the existence of a national emergency, thereby giving the President special powers under the Emergency Banking Act. Those of you born after 1933 have therefore spent your entire lives living under laws whose application has depended upon the continuing existence of a national emergency.

Since the purpose of such emergency laws is to confer upon the Government extraordinary authority which in normal times it would not have, one must assume that undue prolongation of states of emergency has the effect of creating or perpetuating powers which neither the President nor the Congress would think desirable. At least, that is the case if the emergency power legislation is so designed as to confer only those powers which are not necessary in normal times. And it is this last qualification which makes elimination of the situation a more difficult task than one might suppose.

Over the past 42 years, spanning the terms of 22 Congresses and 7 Presidents, some actions have been taken, and some administrative dispositions have been made, under emergency power provisions, which would have been just as necessary and desirable had no emergency existed. Routine statutory authorization was not sought and was not granted only because it was not needed.

This, then, is the central problem which we face in attempting to return to a more rational and orthodox state of law: to eliminate unnecessary and undesirable emergency powers without at the same time upsetting dispositions that are routine and essential portions of our legislative and administrative structure. I think the bill before you does that admirably well, and at the same time establishes a system which will prevent the present state of affairs from recurring.

Unlike the other agencies appearing before you in these hearings, the Department of Justice has no programs which depend on the existence of a national emergency. I cannot pretend, however, to be a completely disinterested witness. As the Assistant Attorney General in charge of the Office of Legal Counsel, it is one of my functions to pass upon the legality of proposed proclamations and Executive orders before they are submitted for the President's signature. My office must consider the problems presented whenever the President chooses to issue an Executive order invoking or delegating powers dependent upon the existence of a national emergency. Thus, we have been wrestling with the legal intricacies of accumulating emergency powers provisions ever since 1933. For reasons of practicality as well as principle, we would welcome a return to legislative normalcy.

This Department strongly supported the effort of the Senate Special Committee on the Termination of the National Emergency to make a systematic study of the problems in this area. In February of 1973, then Attorney General Kleindienst, in response to a request from Senators Mathias and Church, provided the services of a senior staff member of the Office of Legal Counsel to assist the Senate in its study. That staff member, by the way, was Mr. Goldklang.

Considerable effort was devoted to reviewing lists of emergency statutes, determining how and when they had been used and—believe it or not—trying to decide how many national emergencies were still in effect. The bill before you, similar to S. 977 which passed the Senate at the end of the last Congress, is the product of those labors.

H.R. 3884 would accomplish a number of objectives which the Department of Justice enthusiastically supports. Title I would terminate all powers and authorities possessed by the Executive as a result of any declaration of national emergency in effect on the date of enactment. This provision is the core of the legislation—but, as noted above, standing alone it would have the effect of undoing many dispositions which are necessary and desirable parts of our system, and which the Congress would not wish to repeal. The bill meets this problem in two ways: First, those powers and authorities that have already been identified as necessary on a continuing basis are exempted from termination by section 602. I will have more to say about that provision later on.

Second, the termination date for all other powers and authorities is set at 1 year from the enactment of the legislation, so that agencies will have a grace period in which to identify and bring to the attention of the Congress any other provisions which they deem it essential to retain. In our view this grace period is absolutely necessary.

We believe that we have identified all administrative dispositions which have developed since 1933 that are dependent upon emergency powers and authorities for their continuing validity. But anyone who has had a part in that massive effort must retain some humble doubt that several provisions may have been overlooked.

With the stimulus of known termination by a fixed and rapidly approaching date, agencies may be induced to search their own houses with a care and urgency that our inquiries could not produce. I have no reason to believe that anything of importance will turn up; but having waited 42 years, it seems prudent to insure against major error by deferring the effective date of your action for 1 year more.

I may say, the State Department's quite recent discovery of another provision which it feels must be excepted—Section 215 of the Immigration and Nationality Act—simply emphasizes this point. I think it is prudent to allow the agencies to have a year with the axe hanging over their heads, so they will be sure to find everything.

Mr. FLOWERS. I certainly agree with you on that.

Mr. SCALIA. Any emergency declared after the date of enactment of this legislation would not be terminated by title I, but would instead fall under the limiting scheme created by title II. Moreover, title I would only affect those statutes whose conferral of powers is expressly conditioned upon a Presidential declaration of national emergency. This is made clear by section 101(b), which defines the phrase “any national emergency in effect” to mean only “a general declaration of

emergency made by the President pursuant to a statute authorizing him to declare a national emergency"

Thus, laws like the Defense Production Act of 1950, which do not require a Presidential declaration of emergency for their use, are not affected by this title—even though they may be referred to in a lay sense as "emergency" statutes. Some confusion may have resulted from the fact that both kinds of "emergency" provisions have been the subject of hearings and reports by the Senate special committee. For example, Senate Report No. 93-549, released by the special committee, is a compilation both of those statutes available for use only during declarations of national emergency, and of other "emergency" statutes as well. I want to reemphasize that only the former are covered by this proposed legislation, except for certain of the latter that are repealed by section 601.

Title II of the bill provides, for the first time, explicit authorization for the President to make the declaration of national emergency which certain statutes require. (I presume that the Chief Executive has inherent constitutional power to proclaim to the citizens his determination that there exists a national emergency, but such a proclamation would not have the effect of placing any new statutory powers in his hands.)

At present this power to declare a national emergency, which has the effect of creating new Presidential powers, can be implied with respect to some statutes—for example, those which state that certain laws are deemed to be in effect "during any \* \* \* period of national emergency declared by the President" (that is the language of the Trading with the Enemy Act 12 U.S.C. 95a). However, no existing statute authorizes the President, in so many words, to declare an emergency; and some statutes dependent upon the existence of states of emergency do not specifically say who shall declare them.

The present bill thus effects a desirable clarification of the law. When the act fully takes effect, emergency provisions will only be implemented by the President in accordance with the terms of title II. We do not understand the act to supersede existing provisions of law which authorize congressional declarations of emergency; its focus is only on Presidential declarations.

Title II concerns itself with termination of emergency powers as well as their commencement. This is an important part of the bill, since after all it is the failure to terminate accumulated powers that has given rise to the present situation in the first place. Under present law, which does not contain explicit termination provisions, proposals for the use of emergency power often generate discussion as to whether existing emergencies have lapsed or grown stale due to passage of time and change of circumstances. Section 202 of the present bill will eliminate all uncertainty on that point, since it sets forth the prescribed means of termination and also requires the continuing existence of a state of emergency to be formally recorded each year.

The present bill provides two methods for termination: A concurrent resolution by Congress, and a proclamation by the President. The second is, of course, the traditional method for formally ending emergencies. Let me stress that even though we have had a continuous state of emergency of one type or another since 1933, Presidents have terminated a number of separate emergencies during this period. For ex-

ample, in 1952 President Truman terminated emergencies declared by President Roosevelt in 1939 and 1941. Recent invocations of emergency power by the President have relied on only two emergency declarations: Proclamation No. 2914 of December 16, 1950, which is the proclamation of emergency based on events in Korea and elsewhere; and Proclamation No. 4074 of August 15, 1971, which is the national emergency declaration calling upon the Nation to strengthen the economic position of the United States.

Termination of Presidentially declared emergencies by the Congress, provided for in section 202(a) (1) is an innovation. The congressional procedure specified is that of concurrent resolution—that is, a resolution passed separately by each House of Congress and not submitted to the President for his signature.

As this committee is no doubt aware, the Executive has repeatedly expressed the view that use of such a device to offset Executive powers is constitutionally objectionable. This position is grounded in article I, section 7, clauses 2 and 3 of the Constitution, which provide that every bill and every order, resolution or vote, to which the concurrence of the two Houses of Congress may be necessary, must be presented to the President. Ladies and gentlemen, this is an old controversy, and I have no desire to divert these hearings into that major field. I presume that in enacting this legislation the Congress would want its other provisions to endure even if, by private suit or otherwise, the concurrent resolution feature should be stricken down.

I have one last comment of a technical nature, which does not appear in my prepared text, about title II. I think it might be useful to discuss with the committee staff the possibility of including—in the portion of section 202(a) at the bottom of page 3, beginning at line 15—some reference to Presidential terminations as well as congressional termination.

Let me explain: That portion of 202(a), beginning with line 15, says that when the Congress terminates an emergency by concurrent resolution, the emergency terminates on the day that Congress specifies. Moreover, the termination does not affect action taken before the termination, action based on an act committed before the termination, and so forth as provided in clauses (A)–(C).

For some reason the savings clauses do not apply to the second manner of termination, which is cited just above, that is in 202(a) (2)—the presidential proclamation method of terminating an emergency. I am not entirely clear why the savings clauses shouldn't be applicable to both types of termination, and why that paragraph only refers to congressional termination. It may simply have been an oversight, but I would like to discuss it further with the committee staff.

Mr. FLOWERS. I would think that perhaps the matter just relates to the fact that the President wouldn't issue a proclamation terminating it, and these things were in order.

Mr. SCALIA. That may very well be, but I think it bears further discussion. What I am worried about is that it might be read—

Mr. FLOWERS. He might not know about the problem with visas and passports.

Mr. SCALIA. Or it might be read by some—contrary to what I think is the intent—to mean that a Presidential termination has no power to preserve action taken prior to termination, and so forth. I would not like that implication to remain; I don't think it's anybody's intent.

But, whether it is worth making it more explicit, or not—

Mr. FLOWERS. I certainly invite you and your office to study this further and discuss it with our staff before we mark up the bill.

Mr. SCALIA. Fine.

Proceeding to title IV, this makes a substantial and desirable change in the effect of a general declaration of national emergency. Under existing law, such a declaration can have the effect of reviving all sorts of slumbering provisions throughout the United States Code, whether or not they are relevant to the emergency at hand. In many cases, these provisions are not self-executing, so that their mere availability to the President does not bring about unwanted consequences without specific implementing directives.

In other cases, however, changes in law automatically take effect during times of national emergency. See, e.g., 37 U.S.C. 202(e), 37 U.S.C. 407(b). Section 401 of the present bill would change all that, by establishing that no provision of the law shall be triggered by a declaration of national emergency unless and until the President specifies that provision as one of those under which he or other officers will act.

The specification may be made either in the declaration of national emergency or in subsequent Executive order. Such a disposition should benefit all concerned. It will enable the Executive to pick and choose provisions tailored to the emergency at hand; and it will put Congress and the public on notice as to precisely what laws are going to be invoked. I consider this a major desirable change. The system whereby a whole minefield is triggered by a declaration is simply not rational.

Title V includes accountability and reporting provisions. As I noted earlier, our Department has no programs dependent on an emergency, so that we would not feel the pinch of this title. Nevertheless, it may be useful to remind you that other agencies have raised conscientious objections to title V as it is now written. The Defense Department has noted that 30 days may not be sufficient time to prepare a complete accounting of all expenditures directly attributable to an emergency declaration. The GSA representative pointed out that it may be more informative as well as less onerous to require a narrative description of how emergency powers have been used, rather than a list of figures. Certainly it should be possible to reach a solution whereby Congress receives meaningful information and the executive branch is not subjected to inordinate administrative burdens.

Departing again from my prepared text, I have a technical point on title V which I would like to raise. I don't think it necessarily requires any change in the bill's language, but I would like to express my understanding of what that language now says. The accounting required is an accounting of all significant orders of the President, including Executive orders and proclamations, and all rules and regulations issued by agencies during the emergency, or during the war, and issued "pursuant to the declaration" of emergency or war.

Now, I interpret the words "pursuant to" means "under special powers that come into effect by reason of such declaration." What I mean is this: Let's say the President proclaims an emergency during an economic crisis. He may take all sorts of other actions—not under emergency statutes—to meet the same economic crisis, using his ordi-



nary powers. It is not my understanding that Congress wants each such action, taken by the President or the agencies under routine powers, to be sent over. It is my understanding that the purpose of this provision is to identify the actions taken under the special powers that the President wouldn't have but for the existence of the emergency.

Title VI serves a dual function. Section 601 repeals a number of obsolete emergency provisions; the administration supports all of those repealers. Section 602 is in a sense the obverse of section 601. That is, while the latter eliminates certain emergency powers which are clearly of no present or future utility, section 602 preserves in effect those powers and dispositions which, although originally conferred or established under emergency statutes, are clearly a necessary and desirable feature of our normal governmental system.

I will not speak to each of the provisions covered by section 602, but leave that to the agencies whose programs they affect. As you have no doubt observed, they tend to be rather mundane examples of the day-to-day functions of Government.

What I do wish to support with the utmost strength, however, is the necessity for a provision such as section 602, whatever specific items you ultimately choose to include within it. As I noted at the outset of my testimony, the core of the problem with emergency legislation is the fact that much which is authorized and much which has been done under it is really not of merely an emergency nature. Simply to abolish all emergency powers and dispositions on a specified date is not to solve this problem but to ignore it. The greatest part of the effort which the executive and legislative branches have devoted to this bill over the past several years has been directed toward identifying those powers and dispositions which should be preserved while the rest are abandoned.

It is our hope that within a short time those provisions of law can be converted from the emergency portions of the code in which they now appear to standard, nonemergency sections. Until that is achieved, however, the technical conditions which enable them to remain effective must be preserved. This is achieved in section 602, by preserving the effect of previously issued declarations of national emergency only with respect to these specified provisions.

Mr. Chairman, I would like to conclude my testimony by renewing my endorsement of the purpose and effect of this proposed legislation. It enables the elimination of a confusing and irrational state of affairs which has long existed and constantly worsened; and it provides assurance against the reappearance of such a state of affairs in the future.

I will be happy to respond to any questions you or the members of the committee may have.

Mr. FLOWERS. Well, I am not sure I have any questions because it is such an excellent statement, and I mean that sincerely, this is an outstanding overview of the whole matter. You start out by saying you don't have any problems in Justice, but here is the way it looks from everybody else's viewpoint, and that is very helpful to me, and I think I probably speak for the rest of the subcommittee.

This kind of cooperation that Justice has shown with the Senate special committee and here with us is the kind of way Government ought to work; and I commend you people in your part in this.



Mr. SCALIA. Thank you, Mr. Chairman.

Mr. FLOWERS. You are not dragging your feet, but you jumped into it tooth and toenail, so to speak, and tried to work toward a common solution here; and I think we pretty much got it because of the very good cooperative effort that has been shown.

I have no questions, you have answered them all in advance, so to speak. I imagine the gentlelady from Texas might have a few choice ones for you.

Ms. JORDAN. Thank you, Mr. Chairman.

I apologize for missing the earlier part of your testimony, but certainly agree with the chairman that your statement was excellent, that which I heard, and is very helpful.

Are you familiar with some of the objections and reservations which have been raised by other departments to this legislation?

Mr. SCALIA. Most of those, Ms. Jordan, relate to section 602—that is, what ought and ought not to be included in as far as I am concerned, that is not my battle. It seems to me, it is up to the affected departments to persuade you that they need those powers or don't need them. I am not seeking to argue on that point; they are more familiar with those problems than I am.

Ms. JORDAN. As a matter of administration of the departments or agencies of the Government, would you make the assertion that the use of emergency powers for the day-to-day functioning of a specific agency or department of Government is an unwise process?

Mr. SCALIA. Yes, of course, and that is why we support this legislation. Those powers which society really no longer views as emergency powers should not be called that; it distorts our whole process to use language in that fashion. It debases the currency, because there are some powers that are emergency, and they ought to have the kind of dignity and to be accorded the kind of respect by the courts which they deserve. I think we have to be careful not to slap that label on something that doesn't merit it.

That doesn't mean you should eliminate everything that is now in emergency powers. It seems to me you have to separate out what is emergency, and what is not emergency.

Ms. JORDAN. And emergency power should not be the tool for trying to manage and administer an agency or department of Government from day to day, is what I hear you say.

Mr. SCALIA. That's exactly right. The situation is frankly, I think, more embarrassing and undesirable to the President than it is to the Congress. It is really the President who is constrained to take action under the so-called emergency statutes which he knows and the Congress recognizes is simply normal day-to-day action.

Ms. JORDAN. Would it be your judgment that in this legislation we have, as best we could, in proper language, protected against any invasion of vested rights of persons which may have matured under the exercise of emergency powers?

Mr. SCALIA. I think so. There are savings clauses in three separate places in the legislation, which shows a concern of the draftsman for that particular problem. I must add, however, that any savings clause is a shot in the dark until the courts construe it. It is virtually impossible to draft such a clause with such specificity that one can know exactly how it is going to work out. But to the extent we can, I think this legislation does preserve the vested interests.

Ms. JORDAN. You see, the caveat that has been presented to this committee is that the effect of this legislation on the rights of members of the military who are missing in action would somehow be vitiated by this legislation. That their rights would not be protected because they were serving under emergency powers, and if they were terminated and subsequently discovered, that then would be a vitiation of whatever matured rights, pension rights they would have.

I tend to disagree with that, but I would like to hear what you have to say.

Mr. SCALIA. It seems to me that the factual situation you described is directly covered by the language in section 101(a)(3) which says that the termination which the act effects shall not affect "any rights or duties that matured \* \* \* prior to such date."

It seems to me that would cover it, and if there is any doubt about it, the legislative history you and I just made ought to resolve it.

Ms. JORDAN. Well, I certainly agree with your assessment, I think that is exactly where that situation is covered; and I cannot understand why people disagree with that.

Mr. SCALIA. I can't myself.

Ms. JORDAN. Thank you very much. No further questions, Mr. Chairman.

Mr. FLOWERS. Mr. Moorhead?

Mr. MOORHEAD. When a reference is made to persons missing in action, it causes people to be concerned that this legislation may declare those soldiers missing in action, dead prematurely; isn't that it?

Mr. SCALIA. That puts the matter in a little different factual context. I frankly am not familiar with the particular problem that you are concerned about.

Mr. MOORHEAD. That is where the situation that I have heard of in connection with that has come up. There is a question as to whether they would be presumed living, or dead. Under the emergency powers their presumption of living has been continued, and their rights, their pay checks, and so forth kept coming as long as they were presumed alive.

I don't mean to bring you into that, but that is what the problem is.

Mr. SCALIA. It seems to me, nevertheless, that if the right matured under that provision, if he was entitled to payments under that provision, 101(a)(3) would be relevant. I would be happy to look into that and then supplement my testimony.

Mr. MOORHEAD. As I understand it, your Department came up with the language used in 101(a), is that correct?

Mr. SCALIA. No—

Mr. MOORHEAD. Not outright termination of emergency powers?

Mr. SCALIA. It was very much a joint effort. I really couldn't tell you what words in this that I or my staff suggested, and what words were suggested by the draftsmen from the House or Senate that might have been working on the thing.

Mr. MOORHEAD. Could you explain why you happened to go in this direction, rather than an outright termination of the emergency powers?

Mr. SCALIA. You mean outright termination of the emergencies instead of termination of the emergency powers as provided in section 101?

Mr. MOORHEAD. That's right.

Mr. SCALIA. I think there are two reasons, one practical, and one theoretical. The theoretical is presumably less important. As I indicated earlier in my testimony, I'm not entirely sure that when the President chooses to proclaim an emergency and tells the people, "People, there is an emergency," that Congress has any powers to eliminate that statement, that is, to put it back in his mouth. It seems to me what the Congress has the power to do is to say, "You can say as much about emergency as you want, but it will have no effect on your powers." That is really what the Congress has authority to do and wants to do in this legislation.

If the President wants to tell the citizens there is an emergency, he can. You can contradict him, but you can't revoke his statement in any sense.

Mr. FLOWERS. That's the way candidates get to be President, as a matter of fact.

Mr. SCALIA. Right. But in any case, as a theoretical matter, I think this approach is cleaner and more accurate.

Now, the practical point involved is this one: As I indicated in my testimony, 602 is really an important provision. The only way I can be certain that those powers preserved in 602 will not be washed out by this legislation is to continue the conditions necessary for their existence. One of these conditions is the continuation of a Presidential proclamation, only for the purposes of those powers, and for the purpose of no other ones.

I would worry about a provision that would say the Presidential proclamation is revoked, but nevertheless somehow these powers continue. I'm not sure that that would work.

Mr. MOORHEAD. Going back to the declaration of the emergency, that bill seems to presume that only the President could declare a national emergency. Yet, there are a number of laws, as I understand, that speak of an emergency declared by Congress or the President.

Mr. SCALIA. I don't presume that only the President can. In fact, I indicate in my testimony that I understand the bill not to affect congressional power to declare an emergency.

Mr. MOORHEAD. Well, this bill seems to be directed only at Presidential emergencies, though. If you read it through you get the idea that only the President has that authority.

Mr. SCALIA. I think that is a fair statement. If one had no knowledge of the law and history of this thing, and just read the bill, one might say that. I'm not sure what difference that makes.

Mr. MOORHEAD. Well, if Congress can declare an emergency, shouldn't we in some way incorporate that in this legislation?

Mr. SCALIA. I suppose it's more—let me put it this way: It's more important that you handle Presidentially declared emergencies because the ones you declare yourself are always under your control. You can accommodate a change in the facts as easily as you want.

Now, it might be a good idea, I suppose, if you think that Presidential declarations should be reviewed every 6 months, to require congressional declarations to be reviewed every 6 months as well. I have been puzzled by the absence of parity between those two, but I hesitate to press it because it seems to be that's your bailiwick, and not ours.

Mr. MOORHEAD. Well, there is cooperation there between the two bodies, if Congress is involved a lot, the President usually signs it.

Mr. FLOWERS. Will the gentlemen yield?

Mr. MOORHEAD. Yes.

Mr. FLOWERS. Do we have congressionally declared emergencies on the record? I know of none.

Mr. SCALIA. The 1933 emergency has never been "undeclared," and that was a congressionally declared emergency.

As I say, we have not acted under that in recent years.

Mr. SHATTUCK. Well, the 1933 emergency was congressionally approved, wasn't it? The President declared it, and they acted some days later agreed.

Mr. SCALIA. The President declared it first, but I took the congressional action to be more than just an approval of it, I'll check on that.

Mr. FLOWERS. If the gentleman will yield further.

I really had not thought about the point you are making, and I don't have a judgment at this point. But in titles IV and V, for instance, we talk about "when the President declares a national emergency, or the Congress declares war."

Mr. SCALIA. That's correct.

Mr. FLOWERS. There is no provision for Congress to declare any national emergency. It might be well to at least take note of the fact that there is power in the Congress as well, as the gentleman is suggesting, to declare an emergency. And if the bill is to be entirely comprehensive, it ought to at least take note of that at some point within it.

I think you raised a good point.

Mr. SCALIA. I think that might be a good idea, Mr. Chairman. The reason I put the statement in my testimony, concerning the fact that this legislation does not affect congressional power to declare an emergency, is because I did not want it to appear in the legislative history that the Executive interpreted this as a denial of any such power; we don't.

Mr. MOORHEAD. Going to another point, we had Senator Church and Senator Mathias before the committee sometime ago, and the question came up about either the President or the Congress being able to declare an emergency, or to terminate it. And they thought there might be the possibility of an impasse in that particular area. Do you think that might cause us some problems in the future?

Mr. SCALIA. No; absolutely not. Let's not go into the question of the constitutionality of the concurrent resolution device. But assuming that device is effective, it would clearly terminate the emergency; and if it is not effective, it would not terminate the emergency. The answer is going to be clear, anyway.

Excuse me, I don't mean it will terminate the emergency, it will terminate the emergency powers. Now, you may be left in a situation of impasse where the Congress passes its concurrent resolution which is held effective, let us presume, and the emergency powers are terminated; but the President is still going around the country saying, "There is still a national emergency." In my view he is entitled to that, if not under article II of the Constitution then under the first amendment.

Mr. MOORHEAD. It just won't have any effect.

Mr. SCALIA. It just won't have any effect. That's the only kind of inconsistency I can see; and that doesn't seem to be the kind of inconsistency that you should have to be worried about.

Mr. MOORHEAD. In section 501, I guess it is, where we discuss the total expenditures language—

Mr. SCALIA. Yes, sir.

Mr. MOORHEAD. [continuing]. Is that a potential loophole, don't we need more defined breakdowns of what is being done in connection with the national emergency?

Mr. SCALIA. Well, as I suggested in my testimony, I'm not sure that a budget-type listing of expenditures would be as useful to you as a narrative description of what actions are taken. I suppose what you are concerned about it not the dollars, but rather the manner in which the President is using this extraordinary power you accorded him. I'm not sure that asking for dollar figures is the most sensible way. As the GSA testimony suggested, some narrative description may be better.

But, I don't see that there is any loophole here. I honestly think that you will get from this all of the information you want about significant Executive exercise of emergency powers. Certainly, if I were advising the White House or any of the agencies on these on these matters, if this legislation were passed in its present form, I can't conceive how I could advise leaving out any significant emergency action taken.

Mr. MOORHEAD. Now, under section 601 we exempted certain agencies, and so forth, repealed certain laws, rather. Can you tell me why they are being specifically repealed, each one of them?

Mr. SCALIA. Those are not general emergency legislation, but rather specific statutes that were passed to give particular powers in particular circumstances; they are all obsolete. As far as I know there is nobody, either in the executive branch or in the Congress, who thinks they are any more needed, and if that is the case, they ought well to be off the books.

Mr. MOORHEAD. Now, the next question I have pertains to the Ready Reserves; I am sure many of us have served in that organization at one time or another. They are listed as one of the exceptions, and I understand that the White House suggested that they be left out. Can you tell me of any particular reason why the Ready Reserves should be exempted?

Mr. SCALIA. As I indicated in my testimony, Mr. Moorhead, I am not an expert on the need, or lack of need, for each of the exemptions under 602. The effect of this, of taking out the Ready Reserve, would, of course, be that the Reserve would still be available in the future, when a war or national emergency is declared, but would not be available right now. As I understand it, that doesn't matter, because the Ready Reserve is not being used right now. My impression is also that the White House suggestion originated with the Department of Defense.

Mr. MOORHEAD. It has not been used to any extent since Korea.

Mr. SCALIA. I believe that's right. That's why the Department doesn't think it's a necessary power, except in emergencies. The purpose of 602 is only to save those powers which we want to use in a nonemergency; and we don't want to use the Ready Reserve except in war or a national emergency.

Mr. MOORHEAD. What do you think about placing a time limit on those statutes that are exempted from coverage of national emergencies?

Mr. SCALIA. I do not think that would be a good idea, simply because one just cannot predict how long it will take Congress to give the matter careful consideration. Now, there are provisions in the bill for Congress to do that—in 602(b), that which provides each committee having jurisdiction shall proceed to consider permanent legislation. But unless you are sure that consideration will be given, and that Congress is going to have the chance to pass on such legislation, I think it would be irresponsible to establish a fixed date on which when these powers will disappear.

Mr. MOORHEAD. Thank you. And I want to thank you for your thorough coverage, it has been very helpful.

Mr. SCALIA. Thank you, Mr. Moorhead.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Thank you, Mr. Chairman.

I would like to join in the congratulations on your good statement, it gives a fairly brief but complete statement on the law, and some concerns you have about it.

On page 6 of your statement, Mr. Scalia, you mention that “no existing statute authorizes the President, in so many words, to declare an emergency,” and I was just curious, would that include the War Powers Act as well? Does that not set up a situation where the President can declare an emergency, as a matter of fact, subject to recall?

This is not, perhaps, a profound point to this bill.

Mr. SCALIA. I will check that, sir. I don't have it here with me. My statement obviously would include that, and I think it's accurate.

Mr. MAZZOLI. I was just curious, and I wondered whether in studying the war powers, whether you found any conflict, or potential confusion between that bill and the arrangement on how the Congress can oversee, in effect, a Presidential declaration of emergency, and this is where we try to expunge the record largely of emergency related statutes. And if you could then add to your perhaps letter or statement whether or not you see any conflict or any kind of confusion that might arise from that.

Mr. SCALIA. I will. Of course, I am not even sure whether that act relates to Presidential declaration of emergency, or only to declaration of war.

Mr. MAZZOLI. It could well be. I thought we had some words to the effect when he or she perceives there would be some kind of a situation that would cause American nationals, or American property to be in some jeopardy, that action could be taken and deployment of troops, that kind of thing.

I was just curious because this and the war powers sort of deal with the whole situation of emergency and actions which can be taken congressional prerogatives.

So, I would like to see if you think there is any essential conflict here, and how to reconcile differences.

Mr. SCALIA. I will be happy to.

Mr. MAZZOLI. I was also interested in what you mentioned about there having to be some parity, perhaps, or at least this committee ought to give some attention to whether or not there should be a parity in the savings clauses—on page 4—relating to Presidential “undeclaration,” or whatever word they would employ for undeclaring an emergency.

In your judgment that would make the bill a better bill?

Mr. SCALIA. Well, Mr. Mazzoli, I wanted to sort of reserve my rights on it. I am not sure why it's worded the way it is. I would like to talk to the people who were responsible for getting it the way it is. Maybe there is a reason behind it. I'm not aware of any, and if there is not any, it doesn't seem to be very sensible.

Mr. MAZZOLI. And the same point then applies to the congressional declaration of emergency. On page 9 you point out the fact that we might want to consider that; but you don't take any position on it.

Mr. SCALIA. Right, I'm not pressing that. I acknowledge, though, that it seems somewhat anomalous.

Mr. MAZZOLI. Let me go back to what you said earlier for a moment and perhaps clear me up. You indicated the President might well shout "emergency," and we pass a concurrent resolution which says there is no emergency; and then those things which he has pointed out under which we would operate in the emergency state expire; is that what you are saying?

Mr. SCALIA. That's right. The difference between his saying there is, and your saying there isn't, is that your saying there isn't has some effect, and his saying there is does not, except—

Mr. MAZZOLI. Politically.

Mr. SCALIA. That's right.

Mr. MAZZOLI. But as far as legally, what you are saying, his continuing declaration, or continuing assertion that there is an emergency would have no legal effect because all the trigger devices would have been cleared away by the concurrent resolution.

Mr. SCALIA. That's correct.

Mr. MAZZOLI. Let me just ask one last question about the concurrent resolution. You indicated that there is apparently some longstanding debate whether a concurrent resolution has some binding effect on Executive action. Is there anything that your Department has ever done in researching that question that might be of help to us?

Mr. SCALIA. Sir, back through the years, I don't know how many memorandums we have on this issue. It is one of the historical controversies between the two branches. There are instances when the President vetoed legislation because it contained provision for a concurrent resolution; there are instances when the Congress, the constitutional objection being called to its attention, deleted a current resolution provision in proposed legislation; and there are instances when the President said, "I'm signing this law, but I don't like the concurrent resolution feature, and I don't think it's any good."

We have always managed to live, somehow or other, despite this particular disagreement; and I would not like to see this disagreement cause this legislation to fall upon the rocks.

Mr. MAZZOLI. Thank you again for your good statement.

Mr. SCALIA. Thank you, sir.

Ms. JORDAN. Wouldn't you like to see that cleared up, whether we can do congressional action, congressional business by concurrent resolution, to circumvent Presidential action?

I know that it is not anything which would hold up this legislation, but it would be well if this could be clarified, don't you think?

Mr. SCALIA. Yes, ma'am, I certainly do.

Ms. JORDAN. And I don't know how we are going to do that.



Mr. MAZZOLI. If I could just add one point to what the gentle lady said. If I'm not mistaken, I think the War Powers Act deals with concurrent resolutions.

Mr. FLOWERS. And impoundments.

Mr. SCALIA. Impoundment legislation, and I believe the Education Act Amendments adopted in the last session.

Mr. FLOWERS. Well, who knows, when the Supreme Court gets through with something noncontroversial, maybe they will turn to this. [Laughter.]

Mr. FLOWERS. I have no further questions. Again, thank you very much.

Mr. SCALIA. Thank you very much, Mr. Chairman.

Mr. FLOWERS. You have been very, very helpful.

Mr. SCALIA. It has been a pleasure to work with the Congress on this legislation.

Mr. FLOWERS. You have been torn between two subcommittees this morning, and we are delighted that you were able to come.

Mr. SCALIA. I'm glad yours was the last.

Mr. FLOWERS. Thank you.

[The prepared statement of Mr. Scalia follows:]

STATEMENT OF ANTONIN SCALIA, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Mr. Chairman and Members of the Subcommittee: The situation we are addressing today has been building for 42 years. It was in March 1933 that President Roosevelt and Congress both declared the existence of a national emergency, thereby giving the President special powers under the Emergency Banking Act. Those of you born after that time have spent your entire lives living under laws whose application has depended upon the continuing existence of an official state of emergency.

Since the purpose of such emergency laws is to confer upon the Government extraordinary authority which in normal times it would not have, one must assume that undue prolongation of states of emergency has the effect of creating or perpetuating powers which neither the President nor the Congress would think desirable. At least, that is the case if the emergency power legislation is so designed as to confer only those powers which are not necessary in normal times. It is this last qualification which makes elimination of the situation a more difficult task than one might suppose.

Over the past 42 years, spanning the terms of 22 Congresses and 7 Presidents, some actions have been taken, and some administrative dispositions have been made, under emergency power provisions, which would have been just as necessary and desirable had no emergency existed. Routine statutory authorization was not sought and granted only because it was not needed. This, then, is the central problem which we face in attempting to return to a more rational and orthodox state of law: to eliminate unnecessary and undesirable emergency powers without at the same time upsetting dispositions that are routine and essential portions of our legislative and administrative structure. I think the bill before you does this admirably well, and at the same time establishes a system which will prevent the present state of affairs from recurring.

Unlike the other agencies appearing before you in these hearings, the Department of Justice has no programs which depend on the existence of a national emergency. I cannot pretend, however, to be a completely disinterested witness. As the Assistant Attorney General in charge of the Office of Legal Counsel, it is one of my functions to pass upon the legality of proposed proclamations and Executive orders before they are submitted for the President's signature. My office must consider the problems presented whenever the President chooses to issue an Executive order invoking or delegating powers dependent upon the existence of a national emergency. Thus, we have been wrestling with the legal intricacies of accumulating emergency power provisions ever since 1933. For



reasons of practicality as well as principle, we would welcome a return to legislative normalcy.

This Department strongly supported the effort of the Senate Special Committee on the Termination of the National Emergency to make a systematic study of the problems in this area. In February 1973, Attorney General Kleindienst, in response to a request from Senators Mathias and Church, provided the services of a senior staff member of the Office of Legal Counsel to assist the Senate in its study. Considerable effort was devoted to reviewing lists of emergency statutes, determining how and when they had been used and—believe it or not—trying to decide how many national emergencies were still in effect. The bill before you, similar to S. 977 which passed the Senate at the end of the last Congress, is the product of those labors.

H.R. 3884 would accomplish a number of objectives which the Department of Justice enthusiastically supports. Title I would terminate all powers and authorities possessed by the Executive as a result of any declaration of national emergency in effect on the date of enactment. This provision is the core of the legislation—but, as noted above, standing alone it would have the effect of undoing many dispositions which are a necessary and desirable part of our system, and which the Congress would not wish to repeal. The bill meets this problem in two ways: First, those powers and authorities that have already been identified as necessary on a continuing basis are exempted from termination by section 602 of the bill. (I will have more to say about that provision later on.) Second, the termination date for all other powers and authorities is set at one year from the enactment of the legislation, so that agencies will have a grace period in which to identify and bring to the attention of the Congress any other provisions which they deem it essential to retain. In our view, this grace period is absolutely necessary. We believe that we have identified all administrative dispositions which have developed since 1933 that are dependent upon emergency powers and authorities for their continuing validity. But anyone who has had a part in that massive effort must retain some doubt that several provisions may have been overlooked. With the stimulus of known termination by a fixed and rapidly approaching date, agencies may be induced to search their own houses with a care and urgency that our inquiries could not produce. I have no reason to believe that anything of importance will turn up; but having waited 42 years, it seems prudent to insure against—major error by deferring the effective date of your action for one year more.

Any emergency declared after the date of enactment of this legislation would not be terminated by Title I, but would instead fall under the limiting scheme created by Title II. Moreover, Title I would only affect those statutes whose conferral of powers is expressly conditioned upon a Presidential declaration of national emergency. This is made clear by Section 101(b), which defines "any national emergency in effect" to mean only "a general declaration of emergency made by the President pursuant to a statute authorizing him to declare a national emergency." Thus, laws like the Defense Production Act of 1950, which do not require a Presidential declaration of emergency for their use, are not affected by this title—even though they may be referred to in a lay sense as "emergency" statutes. Some confusion may have resulted from the fact that both kinds of "emergency" provisions have been the subject of hearings and reports by the Senate Special Committee. For example, Senate Report No. 93-549, released by the Special Committee, is a compilation both of those statutes available for use only during declarations of national emergency, and of other "emergency" statutes as well. I reemphasize that only the former are covered by this proposed legislation, except for certain of the latter that are repealed by section 601.

Title II of the bill provides, for the first time, explicit authorization for the President to make the declaration of national emergency which certain statutes require. (I presume that the Chief Executive has inherent constitutional power to proclaim to the citizens his determination that there exists a national emergency—but such a proclamation would not have the effect of placing any new statutory powers in his hands.) At present this power can be implied with respect to some statutes—for example, those which state that certain laws are deemed to be in effect "during any \* \* \* period of national emergency declared by the President." 12 U.S.C. 95a. However, no existing statute authorizes the President, in so many words, to declare an emergency; and some statutes dependent upon the existence of states of emergency do not specifically say who shall declare them. The bill thus effects a desirable clarification of the law.

When the Act fully takes effect, emergency provisions will only be implemented by the President in accordance with the terms of Title II. We do not understand the Act to supersede existing provisions of law which authorize congressional declarations of emergency; its focus is only on presidential declarations.

Title II concerns itself with termination of emergency powers as well as their commencement. This is an important part of the bill, since it is the failure to terminate accumulated powers that has given rise to the present situation. Under present law, which does not contain explicit termination provisions, proposals for the use of emergency power often generate discussion as to whether existing emergencies have lapsed or grown stale due to passage of time and change of circumstances. Section 202 of the present bill will eliminate all uncertainty on that point, since it sets forth the prescribed means of termination and also requires the continuing existence of a state of emergency to be formally recorded each year.

The present bill provides two methods for termination: a concurrent resolution by Congress, and a proclamation by the President. The second is, of course, the traditional method for formally ending emergencies. Let me stress that even though we have had a continuous state of emergency since 1933, Presidents have terminated a number of separate emergencies during this period. For example, in 1952 President Truman terminated emergencies declared by President Roosevelt in 1939 and 1941. See Proclamation No. 2074. Recent invocations of emergency power by the President have relied on only two emergency declarations: Proclamation No. 2914 of December 16, 1950, and Proclamation No. 4074 of August 15, 1971. *See e.g.*, E.O. 11810 of September 30, 1974, Continuing the Regulation of Exports.

Termination of presidentially declared emergencies by the Congress, provided for in section 202(a)(1), is an innovation. The congressional procedure specified is that of concurrent resolution—that is, a resolution passed separately by each House of Congress and not submitted to the President for his signature. As this Committee is no doubt aware, the Executive has repeatedly expressed the view that use of such a device to offset Executive powers is constitutionally objectionable. This position is grounded in Article I, section 7, clauses 2 and 3 of the Constitution, which provide that every bill and every order, resolution or vote, to which the concurrence of the two Houses of Congress may be necessary, must be presented to the President. This is an old controversy, and I have no desire to divert these hearings into that major field. I presume that in enacting this legislation the Congress would want its other provisions to endure even if, by private suit or otherwise, the concurrent resolution feature is stricken down.

Title IV makes a substantial and desirable change in the effect of a general declaration of national emergency. Under existing law, such a declaration can have the effect of reviving all sorts of slumbering provisions throughout the United States Code, whether or not they are relevant to the emergency at hand. In many cases, the provisions are not self-executing, so that their mere availability does not bring about unwanted consequences without specific implementing directives. In other cases, however, changes in law automatically take effect during times of national emergency. *See, e.g.*, 37 U.S.C. 202(e), 37 U.S.C. 407(b). Section 401 of the present bill would change all that, by establishing that no provision of law shall be triggered by a declaration of national emergency unless and until the President specifies that provision as one of those under which he or other officers will act. The specification may be made either in the declaration of national emergency or in subsequent Executive orders. Such a disposition should benefit all concerned. It will enable the Executive to pick and choose provisions tailored to the emergency at hand; and it will put Congress and the public on notice as to precisely what laws are going to be invoked.

Title V includes accountability and reporting provisions. As I noted earlier, our Department has no programs dependent on an emergency, so that we would not feel the pinch of this Title. Nevertheless, it may be useful to remind you that other agencies have raised conscientious objection to Title V as it is now written. The Defense Department has noted that thirty days may not be sufficient time to prepare a complete accounting of all expenditures directly attributable to an emergency declaration. The GSA representative pointed out that it may be more informative as well as less onerous to require a narrative description of how emergency powers have been used, rather than a list of figures. Certainly it should be possible to reach a solution whereby Congress receives meaningful information and the Executive branch is not subjected to inordinate administrative burdens.

Title VI serves a dual function. Section 601 repeals a number of obsolete emergency provisions; the Administration supports all of those repealers. Section 602 is in a sense the obverse of section 601. While the latter eliminates certain emergency powers which are clearly of no present or future utility, section 602 preserves in effect those powers and dispositions which, although originally conferred or established under emergency statutes, are clearly a necessary and desirable feature of our normal governmental system.

I will not speak to each of the provisions covered by section 602, but leave that to the agencies whose programs they affect. As you have no doubt observed, they tend to be rather mundane examples of the day-to-day functions of government. What I do wish to support with the utmost strength, however, is the necessity for a provision such as section 602, whatever specific items you choose to include within it. As I noted at the outset of my testimony, the core of the problem with emergency legislation is the fact that much which is authorized and much which has been done under it is really not of merely an "emergency" nature. Simply to abolish all emergency powers and dispositions on a specified date is not to solve this problem but to ignore it. The greatest part of the effort which the Executive and Legislative branches have devoted to this bill over the past several years has been directed towards identifying these powers and dispositions which should be preserved while the rest are abandoned. It is our hope that within a short time those provisions of law can be converted from the "emergency" portions of the Code in which they now appear to standard, non-emergency sections. Until that is achieved, however, the technical conditions which enable them to remain effective must be preserved. This is achieved in section 602, by preserving the effect of previously issued declarations of national emergency only with respect to these specified provisions.

Mr. Chairman, I would like to conclude by renewing my endorsement of the purpose and effect of this proposed legislation. It enables the elimination of a confusing and irrational state of affairs which has long existed and constantly worsened; and it provides assurance against the reappearance of such a state of affairs in the future.

[Whereupon, at 11:50 a.m., the subcommittee adjourned, subject to the call of the chair.]



## APPENDIX

### APPENDIX 1

DEPARTMENT OF JUSTICE,  
Washington, D.C., May 8, 1975.

HON. WALTER FLOWERS,  
Chairman, Subcommittee on Administrative Law and Governmental Relations,  
Judiciary Committee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to requests for information made by members of your subcommittee at the time of my testimony on April 9, 1975, and subsequently by committee staff, relating to H.R. 3884, the proposed "National Emergencies Act," as introduced on February 27, 1975.

1. A question was raised by Representative Jordan concerning the effect of the bill upon the rights of persons missing in action. As I indicated at the hearings, the bill provides, in the savings clause of § 101(a) (3), that rights which matured prior to termination of existing emergency powers will not be affected.

The statement submitted to the subcommittee by the Defense Department on March 19 states that there are currently 913 members of the armed forces listed as missing in action in Southeast Asia. It further indicates that only the emergency authority of 10 U.S.C. 3313, 6386(c), and 9313 authorizes the suspension of mandatory separation and retirement requirements and permits some of these individuals to be kept on the military rolls. Their continuation on the rolls results in certain continuing benefits to their families. The ability to receive such benefits in the future is not, in my view, a "matured right" which would be preserved by § 101(a) (3).

2. Representative Mazzoli asked how H.R. 3884 relates to the War Powers Resolution, 50 U.S.C. 1541-48 (Supp. III). Although the Resolution does contain the words "national emergency," it does not assert that exercise of Presidential powers are conditioned upon a *declaration* to that effect. Section 2 of the Resolution, entitled "Purpose and policy," states that the "constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to \* \* \* (3) a *national emergency* created by attack upon the United States" (emphasis added). This merely asserts the *de facto* existence of a national emergency (created by attack) as a condition for the exercise of Presidential powers; but does not require a Presidential declaration of such emergency as a prerequisite. It follows that the provisions of H.R. 3884 which relate to termination of emergency powers triggered by Presidential declaration would not affect the War Powers Resolution.

Another issue related to the War Powers Resolution could be raised by § 301 of H.R. 3884, which states: "Whenever Congress declares war, any provision of law conferring powers and authorities to be exercised during time of war shall be effective from the date of such declaration." There are a number of references in the War Powers Resolution to declarations of war or the absence of such a declaration. See 50 U.S.C. 1541(c), 1543(a), 1544(b) and (c). For example, the President must terminate certain use of armed forces after 60 days unless Congress "has declared war" or other conditions have been met. 50 U.S.C. 1544(b) (1). It does not appear that § 301 would affect the operation of any of these provisions, but its inclusion in the present bill is strange in light of the existence of that other statute addressed specifically and entirely to the war powers issue.

As I indicated in my testimony, I am unclear as to the purpose of § 301. Some statutes are available for use only "during time of war," but § 301 would not make any change in that availability. H.R. 3884 is meant to be a comprehensive solution to problems generated by 42 years of continuous use of emergency powers, and § 301 is not really pertinent to that solution. Since Congress has so recently legislated on War Powers in more systematic fashion, we would have no objection to deletion of § 301.

3. Committee staff inquired whether in my view it would be appropriate to insert a provision in H.R. 3884, stating that the bill does not purport to deal with emergencies declared by Congress. As I indicated in my prepared statement, we do not understand the Act to supersede existing provisions of law which authorize congressional declarations of emergency; its focus is only on Presidential declarations. We would have no objection to language in the bill stating this explicitly.

4. I indicated to Representative Shattuck that I would check on whether there had ever been a congressional declaration of emergency. There has been at least one. The enactment clause of the Emergency Banking Act of 1933 states that "the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application." 48 Stat. 1. It is not clear that this declaration had any legal effect at the time, since the Emergency Banking Act powers were only triggered by Presidentially declared emergencies; the Act also approved an emergency proclamation by President Roosevelt made a few days earlier. 48 Stat. 1. A paper prepared in our Office describes the sequence of events in some detail. See S. Rep. No. 93-549, pp. 185-187.

The Senate Special Committee was apparently of the view that the congressionally declared emergency is still in effect. S. Rep. 93-549, p. 594. If the Congress wishes to repeal its 1933 declaration, we would have no objection. It could be added to the list of obsolete provisions in § 601.

5. Staff has also inquired concerning the definition of "national emergency" in § 101(b) of the bill. At present these words mean "a general declaration of emergency made by the President pursuant to a statute authorizing him to declare a national emergency." We would have no objection to deleting the words "pursuant to a statute authorizing him to declare a national emergency." As noted in our statement before the subcommittee, no existing statute explicitly authorizes the President to declare an emergency, but such authorization is clearly implied by some statutes which condition the exercise of congressionally conferred powers upon the declaration or existence of a state of emergency. In our view, it is not necessary that § 101(b) refer specifically to such statutes. What is essential is that the definition enable the provisions of the bill to reach all statutes triggered by Presidential declarations; and it seems to us deletion of the indicated phrase would not affect that objective.

If we can be of further assistance please do not hesitate to call upon us.

Sincerely,

ANTONIN SCALIA,  
Assistant Attorney General, Office of Legal Counsel.

## APPENDIX 2

### DEPARTMENTAL REPORTS

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF MANAGEMENT AND BUDGET,  
Washington, D.C., December 12, 1974.

HON. PETER W. RODINO, Jr.,  
*Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your letter of October 17, 1974 to me requesting an expression of my views concerning S. 3957, entitled "To terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies." It also responds to a similar letter of September 27, 1974, concerning H.R. 16668 and H.R. 16743, two related bills.

S. 3957 was introduced in the Senate as a result of the studies conducted by the Senate Select Committee on National Emergencies and Delegated Emergency Powers. It was reported by the Chairman of the Senate Committee on Government Operations, without amendment and without hearings.

Subsequently, representatives of this Office, the Department of Justice, and other agencies of the Executive Branch worked with staff members of the Senate in the preparation of an amendment in the form of a substitute for S. 3957, as reported. That substitute, with one unacceptable provision, was passed by the Senate and is now before your Committee.

Section 202(a) and (b) clearly contemplate that any of the national emergencies declared by the President will continue until terminated by him or by concurrent resolution of the Congress. This accurately reflects the approach agreed upon in discussions with the Senate staff, as described above. However, Section 202(c) injects, presumably as a technical error, the concept that a concurrent resolution could be considered to continue as well as terminate a national emergency. We strongly urge that this subsection be modified by deleting any reference to continuation of national emergencies by concurrent resolution. Such a change, along with any other necessary related technical changes in the subsection, would provide the essential clarification required to make these provisions consistent with those agreed upon and reflected in Section 202(a) and (b). If modified in the foregoing manner, S. 3957 would be acceptable to the Administration.

The provisions of H.R. 16668 and H.R. 16743 are quite similar to the provisions of S. 3957, as reported in the Senate. Many of the provisions of those bills are objectionable. Those provisions are identified and discussed in the report which the General Counsel of the department of the Treasury sent you on November 12, 1974. We associate ourselves with the views expressed in that report and recommend against the enactment of either H.R. 16668 or H.R. 16745, as introduced.

Sincerely,

ROY L. ASH,  
*Director.*

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,  
Washington, D.C., December 24, 1974.

HON. PETER W. RODINO, Jr.,  
*Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request for an expression of the views of the Department of Defense on S. 3957, 93rd Congress, an Act "To terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies."

Although the Department of Defense participated in comprehensive studies of legislation relating to existing emergencies, no formal hearings were held in the Senate on S. 3957, and the Department of Defense did not have an opportunity to make known its views on the bill itself before action by the Senate. For this reason it is hoped that the comments expressed herein will be carefully considered by your Committee. In the event you plan to hold hearings and desire the appearance of a representative of this Department, I would be pleased to make one available.

S. 3957 would terminate, one year after its enactment, any authority conferred on an executive or other federal agency by law or executive order as a result of the existence of a state of national emergency on the day before the termination date. The bill would authorize the President, upon certain findings, to proclaim the existence of a future national emergency but would require the proclamation to be transmitted to Congress and published in the Federal Register. Such a future national emergency would terminate upon a concurrent resolution by Congress or by a proclamation of the President. Thus a future national emergency could be terminated by either Congress or the President.

As a prerequisite to the exercise of any powers or authorities made available by statute for use in the event of an emergency, the bill would require the President to specify the provisions of law under which he or other officials of the Government propose to act.

Enumeration of such powers and authorities would be required to be transmitted to Congress and published in the Federal Register. Further, the President would be required to maintain a file and index of all significant presidential orders and proclamations and each federal agency would be required to maintain a file or index of all rules and regulations issued during future national emergencies. Copies of all such presidential and federal agency issuances would be required to be transmitted to Congress promptly.

World and national conditions have changed since President Truman officially proclaimed the state of national emergency in 1950 incident to the commencement of hostilities in Korea. Many authorities which were used then for the first time were regarded as extraordinary. Since then, experience has demonstrated a need for these authorities in the regular conduct of the day-to-day operations of the Department of Defense. The desirability of terminating existing states of emergency is recognized and no objection to their termination is entertained by the Department of Defense. However, there are certain continuing needs, outlined below, which are accommodated by the existing national emergency proclaimed by President Truman in 1950 but which are not specifically provided for in S. 3957 as passed in the Senate.

First, there are 981 members of the armed forces who are still missing as a result of their participation in the recent hostilities in Southeast Asia. Although the Department of Defense is making every effort to resolve the uncertain status of these men, several factors have hampered this effort so that it is not possible to predict the exact date by which their status will be finally determined. One of these factors is the decree of a federal court in a case styled *McDonald v. McLucas*, U.S.D.C., S.D.N.Y., 73 Civ. 3190, which precludes the Secretaries of the military departments from changing the status of those now classified as missing in action to killed in action until the primary next of kin are afforded an opportunity to attend a hearing with counsel to present whatever evidence they deem relevant and to examine service files. Petition for review of this decision is now pending before the U.S. Supreme Court. In the meantime only the emergency authority of 10 U.S. Code 3313, 6386(e) and 8313 authorizes the suspension of mandatory separation and retirement requirements which would otherwise be applicable to allow some of these members to remain in the armed forces until they return or are accounted for.

Whether or not their situation is viewed as warranting continuation of a national emergency, it would be inequitable to force their separation or retirement while they are in a missing status.

In the field of personnel administration the emergency authority of 10 U.S.C. 3444 and 8444 has been used to grant relief, by way of temporary appointment, to officers in the chaplain, judge advocate and medical fields who, because of constructive service credit in their specialties, are considered for permanent promotion earlier than their line officer counterparts and whose separation for failure of promotion might become mandatory under conditions inconsistent with the needs of the armed forces or fairness to the officers. Legislation which would,



among other things, provide a solution in permanent law for this problem has been introduced at the request of the Department of Defense in the House of Representatives (H.R. 12405 and H.R. 12505) and hearings have begun on both of the bills involved. However, the legislative changes which these bills would effect are so extensive that it would not be realistic to expect enactment in this Congress or early in the next.

In addition to these problems which would result from allowing the emergency authority now provided by 10 U.S.C. 3444 and 8444 to lapse, the President, as commander in chief of the armed forces, would have no authority to grant temporary appointments to truly exceptional officers of the Army or Air Force. For example, the President used this authority to extend a temporary appointment to the next higher grade to the Air Force astronauts who successfully completed suborbital or orbital flights. Continuation of this latitude is needed so that exceptional individual contributions can still be recognized through temporary appointments.

Termination of emergency authority under 10 U.S.C. 3444 and 8444 would also deny to the Army and Air Force the only authority available in some cases to appoint alien doctors as officers to meet increasingly critical shortages of military medical personnel.

Termination of the 1950 national emergency would also terminate entitlement to disability retirement or separation benefits under 10 U.S.C. 1201 and 1203 for members with less than 8 years of service whose disability, although incurred in line of duty while on active duty, was not the proximate result of the performance of active duty. Imposition of this limitation—which would affect only the junior officers and enlisted men—is particularly untimely when the armed forces are endeavoring to meet their manpower needs through voluntary means. Continuation of the authority to retire or separate military personnel with less than 8 years of service who become unfit for further service by reason of a disability incurred in line of duty, is needed as part of the military disability system.

Termination of the national emergency would also terminate the authority of the Department of Defense (and certain other agencies) under Public Law 85-804 (50 U.S.C. 1431-1435) to correct mistakes in contracts, to formalize informal commitments, to indemnify contractors against losses or claims resulting from unusually hazardous risks to which they might be exposed during the performance of a contract and for which insurance, even if available, would be prohibitively expensive, and to grant other extraordinary contractual relief. The Commission on Government Procurement, established by Public Law 91-129, has recommended that the authorizations of P.L. 85-804 be made available generally rather than being dependent upon the existence of a state of war or national emergency. But, here also, enactment of the Commission's recommendation in the near future does not appear likely.

S. 3957 would adversely affect defense contracting in another way, that is, in denying the emergency exception to the requirement for advertising procurements not otherwise authorized to be negotiated. Cf. 10 U.S.C. 2304(a) (1). This exception is now narrowly limited in its application by the pertinent Armed Services Procurement Regulation (32 CFR 3.201), but its application affects major social and economic policies—the policies to favor labor surplus and disaster areas and small business and to achieve a balance of payments favorable to the United States.

Continuation of several emergency authorities governing personnel administration in the naval service is also needed. These authorities include 10 U.S.C. 5231(c), which suspends existing limitations on the number of admirals and vice admirals of the Navy. If this authority is not continued, the Navy would lose approximately one half of its three- and four-star admirals. Similarly 10 U.S.C. 5232(b) suspends existing limitations on lieutenant generals of the Marine Corps. If this authority is not continued, the Marine Corps would lose five of the currently authorized seven lieutenant generals. Section 5711(b) of title 10 authorizes the suspension of the statutory limit of 5% below-the-zone selections specified in section 5707(e). Continuation of the authority provided in 10 U.S.C. 5785(b) is needed to suspend time-in-grade Navy and Marine Corps requirements for promotion to all grades except lieutenant and lieutenant commander. This statute is also the authority for suspension of the mandatory line fraction for promotion of staff corps officers. Section 5787 of title 10 provides for temporary promotions in the Navy. Failure to retain this authority would require approximately 650 limited duty officers in the grade of lieutenant commander to revert to the grade

of lieutenant. Discontinuance of this authority would also require Senate confirmation of all promotions to lieutenant (junior grade).

In view of the need for continuation of the authorities referred to above, the Department of Defense recommends that any legislation terminating emergency powers except the cited statutes from its effect to preserve the substantive provisions which are now needed but which would be lost by termination of the 1950 national emergency.

In general, the Department of Defense is in accord with the S. 3957 goal of repealing obsolete or unnecessary emergency laws. Therefore, subject to the foregoing reservations and recommendations, this Department does not object to enactment of S. 3957.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this letter for the consideration of the Committee.

Sincerely,

MARTIN R. HOFFMANN.

GENERAL SERVICES ADMINISTRATION,  
Washington, D.C., November 12, 1974.

Hon. PETER W. RODINO, Jr.  
*Chairman, Committee on the Judiciary,*  
*House of Representatives,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: Your letter of October 2, 1974, requested the views of the General Services Administration on H.R. 16668 and H.R. 16743, bills concerning the termination of national emergencies and certain authorities with respect thereto.

We attach a copy of a letter dated March 11, 1974, to Hon. Sam J. Ervin, Jr., Chairman of the Senate Committee on Government Operations, reviewing statutory authorities that would be affected by a termination of the current state of national emergency. Of particular concern to us are the authorities described under the heading "II. Statutes That Should be Designated as Essential to the Regular Functioning of the Government."

We continue to support fully the views expressed in our letter to Senator Ervin.

By letter dated October 17, 1974, you requested our views on S. 3957, a similar bill which, as passed by the Senate on October 7, 1974, includes a section 602 stating that the provisions of the Act shall not apply to certain listed provisions of law and the powers and authorities conferred thereby. This section preserves the authorities which are of primary concern to GSA. Accordingly, we support the Senate-passed bill in principle, and we strongly urge that your Committee take similar action respecting any bill on the subject which it may report.

We note with some concern, however, that section 202(e)(1) of S. 3957, by referring to a concurrent resolution "to continue" a national emergency, could be interpreted to require Congressional approval in order for a national emergency to continue beyond six months. We believe that section 202 should be revised to permit the continuance of a national emergency beyond six months if the Congress has not approved a resolution discontinuing it. Otherwise, if the Congress failed to take action one way or the other under the existing provisions within six months, the status of the national emergency and the statutory authorities activated by it would be placed in doubt and could result in unnecessary, lengthy, and burdensome litigation.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to your Committee.

Sincerely,

LARRY F. ROUSH,  
*Acting Assistant Administrator.*

MARCH 11, 1974.

Hon. SAM J. ERVIN, Jr.  
*Chairman, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: We appreciate your request for the views of the General Services Administration regarding the effect of a possible termination of the state of national emergency declared by President Truman in 1950.

Your letter of July 23, 1973, specifically requests the views of GSA regarding certain statutes now available for use during a national emergency. The statutes are listed in a letter dated June 12, 1973, from the Special Committee on the Termination of the National Emergency to the Chairman of the Committee on Government Operations. Your letter seeks the views of this Agency on those statutes which relate to the work, responsibilities, or jurisdiction of GSA and invites GSA's general views with respect to any other of the listed statutes.

Since our response to your letter involves a review of particular emergency statutes that might be affected by a termination of the current state of national emergency, it had been deferred for some time pending full coordination and discussion of the broader implications of possible action to terminate the emergency. As a result of this discussion and coordination, this Agency has had some direct contact with the Special Committee on the Termination of the National Emergency. A copy of my letter to Senators Church and Mathias, Co-chairmen of that Committee, is enclosed.

The Special Committee has requested the analysis of existing emergency statutes in terms of the following categories:

- (1) those which can be repealed because they are obsolete;
- (2) those which should be designated as essential to the regular functioning of the Government;
- (3) those which should be retained in readiness for some future emergency; and
- (4) those "open-ended" emergency provisions which "should be recast in more precise language for use on a case by case basis in the event of some future emergency."

It is the view of this Agency that extreme care must be taken to prevent the lapse of certain statutes essential to the regular functioning of Government. In addition most of these statutes should be retained on a prospective basis for future emergency situations. GSA submits the following comments on these statutes. (These comments generally list the statutes with the numbers, and in the format, used by the Special Committee in its request.)

#### I. EMERGENCY STATUTES WHICH CAN BE REPEALED BECAUSE THEY ARE OBSOLETE

With respect to its application to GSA, the following statute falls into this category. We note, however, that other agencies may be more directly involved.

##### B(167) Settlement of claims under war contracts 41 U.S.C. 101-25

This statute, known as the Contract Settlement Act of 1944, refers primarily to contracts entered into during the World War II period (but prior to the enactment of the Armed Services Procurement Act of 1947). Since GSA itself has no outstanding contracts relating to that period, we defer as to the necessity of retaining this statute to the judgment of other agencies who were more directly involved with those war-period contracts.

#### II. STATUTES THAT SHOULD BE DESIGNATED AS ESSENTIAL TO THE REGULAR FUNCTIONING OF THE GOVERNMENT

A(1) During war or a national emergency declared by Congress or by the President provisions of the act of June 30, 1932, restricting the rental on buildings leased to the Government to 15 percent of the fair market value, may be suspended. [Act of April 28, 1942; 56 Stat. 247; 40 U.S.C. § 278b.]

It is our considered judgment that the authority to lease space for Government purposes without regard to the rental limitation of 40 U.S.C. 278n should be designated as essential to the regular functioning of the Government. A recent example of the necessity for this authority is the fire which occurred on July 12, 1973, at the Military Personnel Records Center in St. Louis, Missouri, which caused substantial damage to a building containing 1,600,000 cubic feet of personnel and medical records relating to former military personnel.

In order to preserve the existing vital records and to assist in the resumption of operations of the Center, it was necessary to obtain space on an emergency basis. A certification, therefore, was obtained from the Department of the Army authorizing the leasing of space without regard to the limitations of 40 U.S.C. 278a. Without this exemption, the acquisition of the substitute space would have been delayed resulting in further damage to valuable records.

A(8) Contracts for supplies and services under the Federal Property and Administrative Services Act of 1949, may be negotiated without advertising if determined to be necessary in the public interest "during the period of a national emergency declared by the President or by the Congress." [Act of June 30, 1949; 63 Stat. 393 § 302(c); 41 U.S.C. § 252.]

This statute permits the negotiation of procurement contracts in times of national emergency. The national emergency declared in 1950 is the basis for the current use of this negotiating authority in a limited number of circumstances. These pertain to small business set-asides, labor surplus set-asides, and balance of payment procedures. Since a termination of the emergency could seriously affect certain of these programs, possible alternative legislation, or other means of continuing the viability of these programs, should be considered.

B(39) Exemption of certain purchases from formal advertising requirements. 10 U.S.C. 2304(a) (1), (2), (16).

These statutes pertain to functions being performed by the Department of Defense or certain other agencies (NASA, and Coast Guard) which are directly subject to the provisions of Title 10 of the U.S. Code. We defer to the judgment of those agencies as to the legislative action to be taken in regard to certain Title 10 statutes.

B(145) Reduction or set-off against assignee. 31 U.S.C. 203, 41 U.S.C. 15.

This statute, which allows the inclusion in procurement contracts of provisions to preclude the making of reductions or set-offs (subject to certain exceptions) against contract assignees, is predicated upon the existence of a national emergency, and specifically the Truman emergency. This authority relating to contract assignments should be retained regardless of the termination of the national emergency, since it permits a flexibility on contracting which often benefits the Government by enhancing the availability of private financing to support necessary procurement.

B(164) Same as A(1), *supra*.

### III. STATUTES WHICH SHOULD BE RETAINED IN READINESS IN THE EVENT OF SOME FUTURE EMERGENCY

Listed below are those statutes included in the Committee's request which in the opinion of this Agency should be retained for possible emergency use. In our judgment, none of the emergency statutes which apply to the real property disposal area should be modified or repealed. Many of these statutes authorize recapture provisions in deeds that could be exercised in time of national emergency. Such provisions have already been included in conveyances, and to repeal these laws might imply that these provisions are released and would not be effective in the future. It would not serve the best interests of the Government to release such provisions without consideration.

A(2) During any national emergency declared by the President or by the Congress, the United States may have exclusive or non-exclusive control and possession of airports disposed of as surplus under authority of this act. [Act of July 30, 1947; 61 Stat. 679(E); 50 U.S.C. App. § 1622(g) (2) (E).]

A(4) In time of war or national emergency heretofore or hereafter declared by the President or the Congress, the United States may use all or any part of the land in Marion County authorized hereunder to be conveyed to the State of Indiana. [Act of June 4, 1954; 68 Stat. 172 § 2(1); 173 § 2(3).]

A(5) The conveyance transferring certain property of the United States in Klamath County, Oreg., to the State shall provide that whenever the Congress of the United States shall declare a state of war or other national emergency, or the President declares a state of emergency to exist, the United States may use the property for the duration of such war or emergency plus 6 months. [Act of August 30, 1954; 68 Stat. 981.]

A(6) The deed conveying a portion of the former O'Reilly General hospital at Springfield, to the State of Missouri, shall provide that during any period of national emergency, the United States shall have the right of exclusive use without charge therefor. [Act of August 9, 1955; 69 Stat. 592.]

A(7) The deed, conveying a portion of the former prisoner of war camp, near Douglas, Wyo. to the State, shall expressly reserve to the United States the right of exclusive use during any period of national emergency. [Act of June 25, 1956; 70 Stat. 337 § 1.]

- A(8) The General Services Administration may negotiate for disposal of surplus property without regard to requirements of advertising for bids, etc., but subject to obtaining such competition as is feasible under the circumstances, if necessary in the public interest during the period of a national emergency declared by the President or the Congress. [Act of July 2, 1958; 72 Stat. 288; 40 U.S.C. § 484(e)(3).]
- B(2) The President may suspend requirements for the filing of documents for publication in the Federal Register in the event of an attack or threatened attack upon the continental United States by air or otherwise. [Act of June 25, 1956; 70 Stat. 337-338; 44 U.S.C. 1505(c).]
- B(8) Effective "during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress, by concurrent resolution, may designate," the President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the national defense effort, to enter into contracts or amendments or modifications of contracts, and to make advance payments thereon without regard to other provisions of law relating to contracts whenever he deems such action would facilitate the national defense. [Act of August 28, 1958; 72 Stat. 973 § 5; 50 U.S.C. § 1435.]
- B(144) Accounting. 31 U.S.C. 821.
- B(166) Exemption from advertising requirements, 40 U.S.C. 484(e). (Same as A(8), *supra*)
- B(168) Exemption from advertising requirements, 41 U.S.C. 252(ac), as applied to 40 U.S.C. 356(j)(1). (Otherwise see A(3), *supra*)
- B(180) Suspension of Federal Register Act. 44 U.S.C. 1505 (Same as B(2), *supra*)
- B(181) Destruction of Military or Naval records.  
44 U.S.C. 3311.
- B(228) Civil Defense Emergency. 50 App. U.S.C. 2291-2297.

We find no statutes among those listed which should be recast in more precise language. As to statutes listed by the Committee but not discussed herein, the General Services Administration defers to other agencies more directly involved.

Sincerely,

ARTHUR F. SAMPSON,  
Administrator.

DEPARTMENT OF STATE,  
Washington, D.C., November 27, 1974.

HON. PETER W. RODINO, Jr.  
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have been asked to reply to your letter of October 17 to the Secretary of State requesting views on S. 3957, a bill "To terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies."

The Department of State has no objection to S. 3957 as passed by the Senate following amendments to the bill reported out of Senate Committee.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Cordially,

LINWOOD HOLTON,  
Assistant Secretary for Congressional Relations.

THE GENERAL COUNSEL OF THE TREASURY,  
Washington, D.C., November 12, 1974.

HON. PETER W. RODINO, Jr.  
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your requests for the views of this Department on H.R. 16668, H.R. 16743, and S. 3957, similar bills, "National Emergencies Act."

H.R. 16668 would terminate all national emergencies in effect at the time of its enactment. H.R. 16743 and S. 3957 would both terminate all powers and authorities bestowed upon governmental bodies due to past national emergencies, although S. 3957 would exempt certain statutes from the application of its provisions. All three bills would establish procedures for Presidential declarations of future national emergencies. H.R. 16668 and H.R. 16743 would provide for the automatic termination of such emergencies after 180 days, absent Congressional action, while S. 3957 would require Congress to meet within six months after the declaration of such an emergency to determine whether such emergency should be terminated by concurrent resolution.

H.R. 16668, H.R. 16743, and S. 3957 are variations of the "National Emergencies Act" prepared by the Senate Special Committee on the Termination of the National Emergency following hearings pertaining to the desirability of repealing existing national emergencies. No hearings have been held, however, on any version of the "National Emergencies Act."

The provisions of both H.R. 16668 and H.R. 16743 are of serious concern to this Department. S. 3957, on the other hand, would present few problems. The major objections of the Department relate to those provisions in section 8 of H.R. 16668 and in section 601 of H.R. 16743 which would repeal 12 U.S.C. 95 and 12 U.S.C. 95a (section 5(b) of the Trading with the Enemy Act). The Department opposed the repeal of these statutes in its report to the Senate Special Committee on the Termination of the National Emergency and continues to be opposed.

12 U.S.C. 95 relates to limitations and restrictions on the business of members of the Federal Reserve System "during such emergency period as the President . . . may prescribe." The section was enacted March 9, 1933, and had specific reference to declaration of the "bank holiday" proclaimed by the President on March 6, 1933. The statute, although passed to ratify the action of the President in closing the banks, is not obsolete. The language of the section invests the Executive with the authority to regulate or suspend the activities of all banks that are members of the Federal Reserve System—which would include all national banks—during an emergency. The Department is of the opinion that the authority to so act in times of financial crisis is necessary. Thus, 12 U.S.C. 95 should be retained as an emergency statute, as would be allowed by S. 3957.

12 U.S.C. 95a, which embodies section 5(b) of the Trading with the Enemy Act, provides for the regulation by the President during periods of war or national emergency of banking transactions, gold and silver activities, transactions in foreign exchange, and the exercise of rights in property subject to American jurisdiction in which foreign nationals have an interest. Section 5(b) of the Trading with the Enemy Act is also codified in 50 U.S.C. App. 5(b). Under the authority of section 5(b), regulations have been issued under which controls are maintained in implementation of existing policies with respect to North Korea, North Vietnam, and Cuba, and some \$80 million of Chinese assets have been frozen in order to be available in the settlement of claims of American citizens for the expropriation of their property in mainland China.

The Department believes that section 5(b) of the Trading with the Enemy Act is not obsolete and not only should not be repealed, but should be excluded from the provisions of the bills as a whole, as is provided by S. 3957. Section 5(b) should be available to deal with financial emergencies which may arise in the future.

Furthermore, inclusion of section 5(b) under section 2 of H.R. 16668 and under section 101 of H.R. 16743 would seriously affect the negotiating position of the United States with regard to the existing controls, discussed previously, which regulate transactions with several foreign countries and their nationals and which freeze significant amounts of Chinese and Cuban assets to be held for an eventual settlement of the claims of United States citizens whose property in Communist China and Cuba has been seized without compensation. In this regard, it also appears that constitutional problems might arise with respect to the validity of continued blockings of assets of foreign countries when all national emergencies or authorities thereunder have been terminated, as the bills contemplate. We believe that no definitive Congressional action should be effected with respect to section 5(b) through the vehicle of any of these bills. It is essential that before any action is taken the appropriate committees closely study its potential impact on section 5(b) of the Trading with the Enemy Act. S. 3957 would exempt section 5(b) from its provisions and would enable such a study to be made, thus satisfying our objections.

There are several other problems with H.R. 16668 and H.R. 16743 which also seriously concern the Department. Section 2 of H.R. 16668 would terminate all national emergencies in effect on the date of enactment, which we understand to be four in number, 270 days after enactment, and section 101 of H.R. 16743 would terminate all powers and authorities possessed by the Executive branch due to such emergencies within the same period. This nine month period was intended to give the Committees of the Congress an opportunity to enact into permanent legislation those existing programs which the Congress decides should be preserved. S. 3957 provides for a one year period to be used for the same purpose.

The Department feels that nine months, or even one year, is much too brief a time for the Congress to deal with the significant problems which might arise with respect to those statutes appropriately covered by the bills. For example, American importers have relied extensively on the practice of warehousing merchandise in Customs bonded warehouses for periods in excess of the initial statutory periods afforded by sections 491, 557, and 559 of the Tariff Act of 1930. Such extensions have been made possible by Customs regulations authorized by Proclamation 2948 which President Truman issued under the authority of section 318 of the Tariff Act of 1930 (19 U.S.C. 1318), an emergency statute. Due to the extensive reliance on these Customs regulations in the past, a statutory replacement for the existing authority conferred on this Department by Proclamation 2948 will be recommended. However, given the nature of the legislative process and the multitude of other legislative programs of current importance, it is unlikely that the grace periods provided by these bills would be sufficiently long for the enactment of such legislation. Consequently, the Department recommends that the grace periods in all three bills be substantially lengthened.

Section 5 of H.R. 16668 and section 402 of H.R. 16743, dealing with future national emergencies, would provide that such emergencies are automatically terminated six months after declaration unless continued to a specified date by concurrent resolutions. Section 5 of H.R. 16668 would further provide that no concurrent resolution extending the termination date of a national emergency shall be valid if agreed to more than ten days before the original expiration date. The Department believes that these termination provisions are undesirable. Instead, it would be preferable to adopt the termination procedure of S. 3957, which provides that future emergencies proclaimed by the President to deal with the highly significant national and international problems justifying such a declaration of national emergency should continue unless declared terminated by a concurrent resolution of the Congress or by a Presidential proclamation.

Section 6 of H.R. 16668 would provide for the recordation of rules and regulations promulgated during a national emergency by the Executive and for the transmission of such rules and regulations to the Congress at the end of such emergency. Section 501 of H.R. 16743 would provide that orders as well as rules and regulations should be transmitted to the Congress as soon as practicable after issuance. Section 501 of S. 3957 would provide that only significant orders as well as rules and regulations be transmitted to Congress promptly. The Department agrees with the principle of these sections; indeed, virtually all such documents of general applicability are in fact published in the Federal Register. However, as drafted, section 501 of H.R. 16743 is so broad as to require every minute action taken under emergency powers to be reported in this fashion, including those with no policy significance whatsoever. This would impose an unworkable burden without commensurate benefit on the Executive branch.

In addition to the above, the Department would like to make the following technical comments: (1) It would appear that the word "if" should be deleted from the fifth line of section 403(a) of H.R. 16743 as superfluous. (2) Section 8 of H.R. 16668 and section 601 of H.R. 16743 list as being repealed 50 U.S.C. 9(e), which does not seem to exist. (3) Although all three bills refer to "12 U.S.C. 95(a)", the correct citation for the section is "12 U.S.C. 95a". (4) H.R. 16668 and H.R. 16743 would repeal certain sections of the United States Code which have not been codified into statutory law and are merely prima facie evidence of such law. To the extent that the law in these fields should be repealed, it would be preferable for the language of the bills to refer to the basic statutes which are involved.

As a result of the above, the Department has strong objections to H.R. 16668 and H.R. 16743 as drafted. S. 3957, however, would satisfactorily deal with all the aforementioned problems which this Department has with the other two



bills. Consequently, the Department recommends favorable consideration of S. 3957 in lieu of action on H.R. 16668 or H.R. 16743.

The Department has been advised by the Office of Management and Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to the Committee.

Sincerely yours,

RICHARD R. ALBRECHT,  
General Counsel.

DEPARTMENT OF COMMERCE,  
Washington, D.C., April 1, 1975.

Hon. PETER W. RODINO, Jr.  
*Chairman, Committee on the Judiciary,*  
*House of Representatives, Washington, D.C.*  
Attention Mr. William P. Shattuck.

DEAR MR. CHAIRMAN: This is in reply to your oral request for information with respect to section 9 of the Merchant Ship Sales Act of 1946 (60 U.S.C. App. 1742) which would be repealed by section 601(g) of H.R. 3884.

The purpose of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1735 et seq.) was to authorize the sale of several thousand merchant ships of various types which had been built by or for the account of the United States Government during the period January 1, 1941 and September 2, 1945 to provide logistical support to the Armed Forces during World War II. It was a surplus property disposal statute. Sales were authorized under the statute both to citizens of the United States and to aliens. The statute provided a formula by which the fixed sales price of each type of vessel was to be ascertained. The fixed price at which each vessel was to be sold was 50 percent of the "prewar domestic cost" of that type vessel. The "prewar domestic costs" was defined as the amount, as determined by the United States Maritime Commission, for which a vessel of that type could have been constructed on or about January 1, 1941. The sales authority under the Act expired on January 15, 1951.

Between January 1, 1941 and March 8, 1946 (the date of enactment of the Act), the United States Maritime Commission had sold, under other legislation, certain vessels built during the same period to citizens of the United States and had contracted to sell other vessels to such citizens the building of which was contracted for during this same period at prices considerably in excess of the prices at which the same vessels would be sold under the Act. These vessels that were sold prior to the date of enactment of the Act, nevertheless, would operate in competition with vessels sold under that statute. As a matter of fairness, and to equalize the competitive position of these vessels sold prior to the date of enactment of the Act with that of vessels sold under that statute, section 9 provided for an adjustment of the price of such vessels sold before its enactment so that the cost of such vessels to their owners would be the same as though the vessels had been purchased under the Merchant Ship Sales Act of 1946.

To qualify for the adjustment, however, the owners of such vessels were required by section 9 to apply within 60 days after the date on which the United States Maritime Commission published in the *Federal Register* the applicable "prewar domestic costs" under the Act. Such costs were published within a few months after the date of enactment of the statute. The time within which to apply for an adjustment has long since expired. All such applications have long ago been processed and there is no litigation outstanding with respect to any of them.

One of the conditions that any applicant for an adjustment had to agree to was that if the United States requisitioned the use of his vessel during the national emergency declared by President Roosevelt on May 27, 1941, the compensation to be paid for such use would not exceed 15 percent per annum of the fixed price at which the vessel would have been sold under the Merchant Ship Sales Act of 1946. This emergency was terminated by the Act of July 25, 1947 (P.L. 239, 80th Congress: 61 Stat. 449).

Section 9 of the Merchant Ship Sales Act of 1946 is now a nullity. It does not now provide authority to do anything and no future proclamation of a national emergency would provide any authority under it. Repeal of the section, therefore, is unrelated to the purpose of H.R. 3884.

Sincerely,

ROBERT J. BLACKWELL,  
Assistant Secretary for Maritime Affairs.

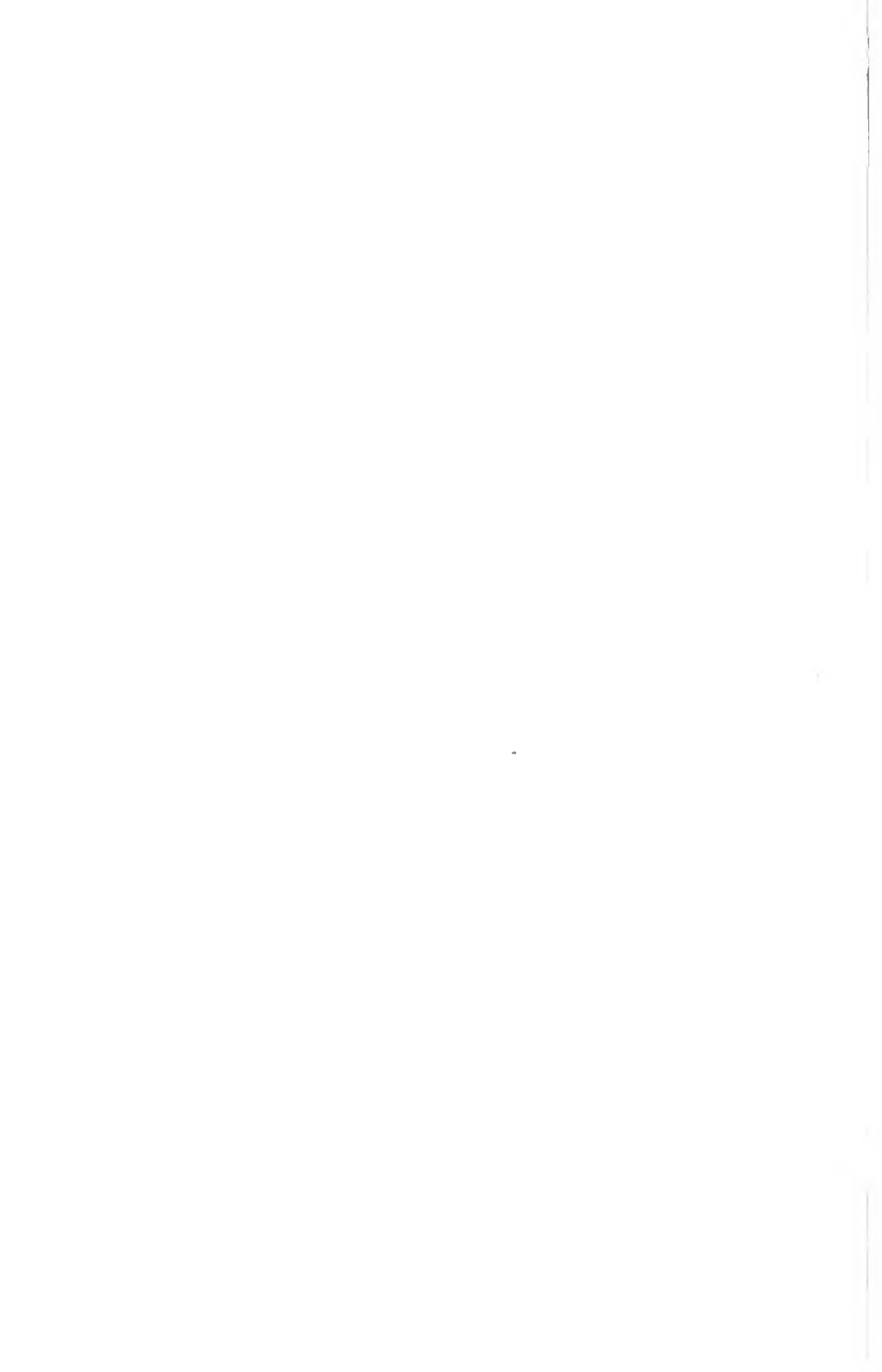
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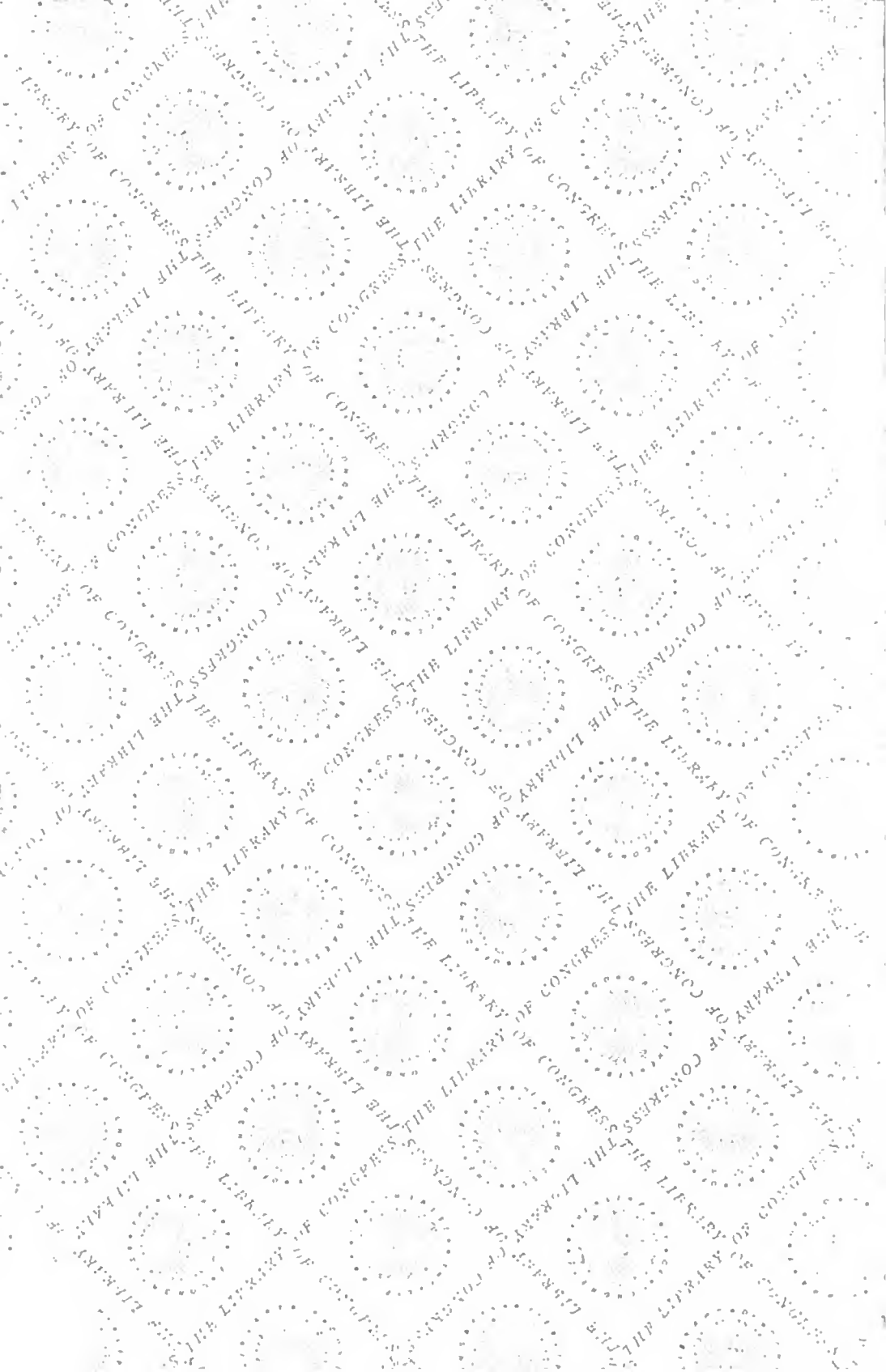
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